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A CONSTITUTIONAL AND EMPIRICAL ANALYSIS OF IOWA'S ADMINISTRATIVE RULES REVIEW COMMITTEE PROCEDURE

Jerry L. Anderson & Christopher Poynor***

ABSTRACT

In Iowa, a joint legislative committee, called the Administrative Rules Review Committee (ARRC), is given significant power over agency rulemaking. The ARRC can delay a rule, either for a seventy-day period or until the end of the next legislative session. The committee can also object to a rule, which switches the burden of proof to the agency in any future judicial challenge and makes the agency liable for the litigation costs of successful challengers. In this Article, the Authors study fifteen years of ARRC activity to determine how the committee has used its authority in order to assess the degree to which this mechanism allows legislative intrusion on executive administration. The data indicates that the ARRC has used its powers selectively, targeting certain agencies for closer scrutiny. Moreover, although the annual number of objections and delays has been relatively small, the overall impact of the review process extends beyond the formal actions taken by the committee. The Article then subjects the ARRC procedure to a separation of powers analysis and concludes that the objection and delay authorities exceed the permissible boundaries of legislative power.

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The legislative department . . . can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.¹

1. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

I. INTRODUCTION

As every high school civics student knows, in our system of government, the three branches have carefully delineated roles: the legislative branch enacts the laws, the executive branch administers them, and the judicial branch determines whether the laws have been properly enacted and executed.² While the Iowa constitution does not precisely define these roles, it does explicitly demand the separation of these powers: “[N]o person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.”³ Indeed, strict adherence to the checks and balances created by this tripartite structure is a fundamental principle of constitutional law.⁴

Nevertheless, every participant in the process of governing also knows that the simplistic version of this system we learned in civics class is much more complicated in reality. Although the legislature may make general policy choices in creating a law, by necessity many more policy choices must be made by the executive branch in determining how the law will be carried out.⁵ In some cases, the legislature deliberately leaves these

2. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.”).

3. IOWA CONST. art. III, div. 1, § 1; see also *State v. Ronek*, 176 N.W.2d 153, 155 (Iowa 1970) (noting the separation of powers concept “recognizes the constitutional prohibition against one department’s exercising another’s powers”).

4. See *Chadha*, 462 U.S. at 957–58 (“To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”); see also *Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1, 6 (Iowa 1983) (“[C]rossing the lines of power in any direction violates the separation of power concept.”).

5. As the Iowa Supreme Court recognized long ago:

The exact line of demarcation between legislative power and administrative duties in some cases is not easily determinable. It may be stated, in a general way, that it is for the Legislature to determine what the law shall be, to create rights and duties, and provide a rule of conduct. This does not necessarily mean that the Legislature must lay down a strict rule that must be followed by an administrative officer, but that an executive or commission may be vested by the legislative branch of the government with discretion, within certain limits, in carrying out the provisions of a statute.

choices to the agencies of the executive branch, perhaps because of their expertise and experience, or because the legislature does not have sufficient time, or the political will, to make these decisions. In other cases, the legislature simply may not anticipate all of the policy choices that an agency will need to make in implementing the legislation. As a result, the legislature, in enacting legislation, often delegates a great deal of discretion to the agency charged with implementing it, which the agency then often exercises through its rulemaking power.⁶

The legislature, while understanding the impossibility of making all policy decisions itself, naturally has some concerns about simply handing over such significant policy-making authority to the executive branch. The legislature would like to be able to monitor the agency's use of its discretion and make sure the agency does not go beyond the intended limits of the legislative mandate.⁷ Of course, the legislature can review agency rules and tighten or modify statutory authorizations when it feels the agency may have strayed off course.⁸ However, in reality, making statutory adjustments in response to agency policy decisions is a cumbersome process, which seems to occur only in the most dramatic instances of agency overreaching. In most cases, the legislature simply does not have the time to monitor and respond to agency rulemaking actions by micromanagement tinkering with statutory language.

Therefore, legislative bodies have devised creative mechanisms to monitor and control agency rulemaking. At the federal level, for many years Congress employed the legislative veto,⁹ which allowed agency regulations to be invalidated by something less than the full two-house,

McLeland v. Marshall Cnty., 201 N.W. 401, 403 (Iowa 1924).

6. See e.g., *id.*

7. See IOWA CODE § 17A.8(8)–(9) (2011).

8. See *id.*

9. The legislative veto and similar devices have generated a substantial amount of academic literature. See, e.g., Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Frank C. Newman & Harry J. Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953); Bernard Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); John M. Conley, Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 283; H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

presidential approval process required for lawmaking.¹⁰ In some cases, one house of Congress acting alone could set aside the rules;¹¹ in other cases, a concurrent resolution, which requires the assent of both houses but no presidential signature, was required.¹² In some cases, a congressional committee acting alone could reverse the regulation.¹³

All of these creative instruments of legislative control came to an abrupt stop with the U.S. Supreme Court's decision in *INS v. Chadha*.¹⁴ At the time, nearly 200 congressional enactments contained legislative veto provisions.¹⁵ Even though the veto of agency action was not the enactment of a bill, the Court still found such action to be "essentially legislative in purpose and effect" because it altered "the legal rights, duties, and

10. See Ginnane, *supra* note 9, at 572–92 (discussing the history of legislative veto provisions). Ginnane determined that Congress began using the legislative veto technique in 1932, in Title IV of the Legislative Appropriation Act. *Id.* at 576. This allowed Congress to overrule executive orders relating to reorganization of the Executive Branch with a single-house veto. *Id.* Ginnane concluded that there were "grave doubts" about the constitutionality of such provisions:

It is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore "delegate" the power to Congress free of constitutional restrictions on the manner of its exercise. The result—and, indeed, the frankly stated purpose—of such provisions is to exclude the President from decisions of Congress which in their legal consequences are indistinguishable from statutes and which are seemingly the type of policy decisions which Article I, Section 7 requires to be submitted to the President.

Id. at 595.

11. See, e.g., *id.* at 604.

12. A simple resolution is one passed by a single house of a bicameral legislature. *Id.* at 570 n.1. A concurrent resolution requires the assent of both houses. *Id.* In contrast, a joint resolution requires not only the assent of both houses, but also the approval of the chief executive (the President or a governor). *Id.*; see, e.g., 42 U.S.C. § 2074(a) (2006); 50 U.S.C. § 1544(c). The joint resolution is used at the federal level primarily for "special purposes and . . . incidental matters." *Bowsher v. Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., concurring) (quoting 7 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 334 (1977)) (alteration in original) (internal quotation marks omitted). The joint resolution therefore has the same force and effect as a bill. See, e.g., *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 184 (1901) (Brown, J., concurring).

13. See, e.g., Ginnane, *supra* note 9, at 604.

14. *INS v. Chadha*, 462 U.S. 919 (1983).

15. *Id.* at 967 (White, J., dissenting).

relations of persons.”¹⁶ As such, the Court held legislative action must follow the constitutionally mandated requisites of bicameralism,¹⁷ which requires the affirmation of both houses,¹⁸ and the assent of the Executive via presentment,¹⁹ unless overridden by supermajorities in each house.²⁰ The legislative veto, which attempted to shortcut that process, thus could not be allowed.²¹ As the Court noted: “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”²²

Although *Chadha* stifled federal attempts at legislative control over agency rulemaking,²³ state legislatures have continued to experiment in this area, as discussed below.²⁴ Iowa law provides for an unusual legislative review process, which avoids clear application of *Chadha*’s pronouncements.²⁵ The Iowa Administrative Procedure Act (IAPA)

16. *Id.* at 952.

17. *Id.* at 957–59.

18. U.S. CONST. art. I, § 7, cl. 2.

19. *Id.*

20. *Id.*

21. *Chadha*, 462 U.S. at 957–59.

22. *Id.* at 951.

23. While *Chadha* eliminated the use of the legislative veto or similar mechanisms, Congress has found other ways to influence or control agency rulemaking. For example, it uses appropriations riders that prohibit funds from being used to carry out disfavored regulations. See Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 460–62 (1992); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 457–58 (1997).

24. See *infra* Part II.B. Of course, *Chadha* was based on the U.S. Constitution and would not be binding on a state supreme court’s interpretation of its own constitutional provisions. See *Chadha*, 462 U.S. at 944. Nevertheless, *Chadha* serves as guidance to state decisions on legislative veto provisions. See, e.g., *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 635–36 (Kan. 1984); *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 914 (Ky. 1984). While the Iowa Supreme Court is not bound by the U.S. Supreme Court’s pronouncements on separation of powers, it may find the Court’s reasoning persuasive. See, e.g., *Berent v. City of Iowa City*, 738 N.W.2d 193, 205 (Iowa 2007) (discussing *Chadha* regarding the doctrine of necessity as used in deciding constitutional issues); *Iowans for Tax Relief v. Campaign Fin. Disclosure Comm’n*, 331 N.W.2d 862, 868 (Iowa 1983) (finding the Iowa free speech and association constitutional standard to be the same as the federal constitutional standard).

25. See IOWA CODE § 17A.8 (2011).

created the Administrative Rules Review Committee (ARRC),²⁶ a joint committee of both houses, which has jurisdiction to review all rules promulgated by the state's administrative agencies.²⁷ Some of the ARRC's functions are not controversial. For example, the committee may hold hearings and require agency officials to attend and answer questions about rules.²⁸ Likewise, it may refer a problematic rule to the general assembly's legislative leaders, who will then refer the rule to the appropriate standing committee for review.²⁹

However, the IAPA also gives the ARRC more controversial powers. First, the committee is given three ways to delay the effectiveness of a rule.³⁰ Upon a two-thirds majority vote, the ARRC may delay the effective date of a rule for seventy days if the committee needs more time to study the rule.³¹ Second, upon a two-thirds majority vote, the ARRC may invoke a "session delay," which delays the rule's effective date until the end of the next legislative session.³² The rule is then referred to the appropriate standing committee and the legislature has the opportunity to nullify or modify the rule before it takes effect.³³ The ARRC may also request a regulatory analysis that effectively delays the rulemaking while the agency prepares information regarding its costs and benefits.³⁴

Finally, the ARRC has an "objection" power. The ARRC can file an objection if the committee finds that a rule, or some portion of it, is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency."³⁵ The objection, along with the rule, is then

26. Act of May 29, 1974, ch. 1090, § 8, 1974 Iowa Acts 165, 170–71 (codified at IOWA CODE § 17A.8 (1975)).

27. IOWA CODE § 17A.8 (2011). The committee consists of three senators appointed by the majority leader of the senate, two senators appointed by the minority leader of the senate, three representatives appointed by the speaker of the house, and two representatives appointed by the minority leader of the house. *Id.* § 17A.8(1)(a)–(b). The statute also provides for review by the governor and the attorney general. *Id.* § 17A.4(6)(a). This Article focuses solely on the legislative committee powers.

28. *Id.* § 17A.8(6).

29. *Id.* § 17A.8(7).

30. *Id.* §§ 17A.4(6)–(7), 17A.4A, 17A.8(8)–(9).

31. *Id.* § 17A.4(7).

32. *Id.* § 17A.8(9).

33. *See id.*

34. *Id.* § 17A.4A.

35. *Id.* § 17A.4(6)(a). The attorney general and the governor also have this objection authority. *Id.*

printed in the Administrative Rules Bulletin and the Iowa Administrative Code.³⁶ The objection has significant consequences. When an administrative rule is challenged in court, normally the rule is afforded a presumption of validity and the person challenging the rule has the burden of proving it invalid.³⁷ However, once an ARRC objection is lodged, the burden of proof shifts to the agency to prove that the rule is not invalid.³⁸ Moreover, the stakes are raised for the agency because the statute provides for fee-shifting in such cases: after an objection is filed, if a court declares the rule invalid, the agency must pay the challenger's court costs, including reasonable attorney's fees.³⁹

The ARRC procedure may be critiqued on both policy and constitutional grounds. As a matter of policy, the question is how the ARRC procedure impacts the democratic process in Iowa. The drafters of the IAPA likely envisioned the ARRC as a political check on the rulemaking process, which would help ensure that agencies do not exceed the boundaries of their delegated authority.⁴⁰ However, others have warned that allowing a small group of legislators to interfere with the regulatory process is antidemocratic.⁴¹ Empirical analysis of how the legislature has used the ARRC process informs the policy question. For this Article, we studied ARRC actions over the last fifteen years to provide a picture of how this mechanism works in practice. We wanted to know, for example, whether the ARRC has used the tools of delay and objection frequently or rarely? Which agencies have most often been the target of ARRC actions? How have agencies and the legislature responded to ARRC delays and objections? How have Iowa courts handled challenges to administrative rules after objections? After reviewing the data on ARRC actions, we are at least able to begin answering these questions.

The ARRC procedure also raises significant constitutional issues. Although the ARRC is not empowered to veto administrative actions, its delay and objection powers have a substantial impact on agencies and individuals affected by a rule. The delay directly harms those who would benefit from the rule. An ARRC objection changes the ordinary

36. *Id.*

37. *Id.* § 17A.19(8)(a).

38. *Id.* § 17A.4(6)(a).

39. *Id.* § 17A.4(6)(b).

40. *See generally* ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 8.1.1–2 (1986) (presenting arguments in favor of review of agency rules).

41. *See id.* § 8.1.3.

framework for judicial review and may make the agency reluctant to enforce a rule.⁴² As a result of its power, the opinions of ARRC members carry far greater weight than those of ordinary citizens in the rulemaking process. This Article discusses whether the ARRC mechanism violates separation of powers principles.

The question is a timely one. In 2011, the ARRC imposed a session delay on a rule promulgated by the Natural Resources Commission, which banned the use of lead shot in dove hunting.⁴³ The Sierra Club then brought suit to challenge the ARRC procedure as unconstitutional.⁴⁴ The legislature failed to act on a resolution that would have reversed the rule.⁴⁵ However, after the session, Governor Branstad issued an executive order directing that the lead shot ban be rescinded.⁴⁶ This action rendered moot Sierra Club's suit, which they voluntarily dismissed a short time later.⁴⁷ Thus, while the ARRC avoided a court decision in this case, the controversy indicates that the constitutional issues regarding its authority may soon need to be decided.

In the end, we conclude that the ARRC process has significant consequences, both positive and negative, for the functioning of government in Iowa. From a policy perspective, giving a small subset of the legislature disproportionate authority over the executive function raises democratic concerns that outweigh the advantages. The data indicates that the ARRC has used its powers unevenly, focusing on agencies that carry out politically sensitive missions. The implication raised by many of these actions is that, rather than providing a more democratic political check on agency action, the ARRC often functions to provide a "back door" method of achieving results that could not be obtained through the more open process of administrative rulemaking or the full-fledged legislative process.

42. See IOWA CODE § 17A.4(6)(a).

43. XXXIV Iowa Admin. Bull. 176 (Aug. 10, 2011); ADMIN. RULES REVIEW COMM., MINUTES OF THE AUGUST 2011 MEETING 1-2 (2011), *available at* <http://www.legis.iowa.gov/DOCS/LSA/ARR/ARRMinutes/2012/ANSAH003.pdf>.

44. Petition for Declaratory and Injunctive Relief, *Sierra Club Iowa Chapter v. Iowa ARRC*, No. CE71093 (Iowa Dist. Ct. Polk Cnty. Mar. 23, 2012).

45. H.J. Res. 2001, 84th Gen. Assemb., Reg. Sess. (Iowa 2012). This bill passed the Iowa House of Representatives 73-27, but did not come up for a vote in the Iowa Senate. H. JOURNAL, 84th Gen. Assemb., Reg. Sess. 192-93 (Iowa Feb. 2, 2012).

46. Exec. Order No. 77 (Iowa May 11, 2012).

47. Dismissal Without Prejudice, *Sierra Club Iowa Chapter*, No. CE71093 (Jun. 29, 2012).

Even if the ARRC process proved to be desirable from a policy perspective, we conclude that the committee's powers of delay and objection are constitutionally flawed. Once a law is enacted, the executive branch has the sole responsibility of administering the law. While the legislature could legitimately declare by statute that all administrative rules—or those related to a certain statute or agency—would be delayed until the end of the next session, it cannot allow a subset of the legislature to selectively delay the administration of the law. The delay of administrative rules clearly alters the “legal rights, duties, and relations of persons”;⁴⁸ therefore, it must follow the bicameralism and presentment conditions to be valid. Similarly, allowing a joint committee to effectively amend the statutory burden of proof for particular administrative rules is either a legislative act that circumvents the constitutionally mandated procedure or an extrajudicial act that encroaches on the powers of the judicial department.

II. THE ARRC PROCESS AND POWERS

A. History and Outline of ARRC Authority

In Iowa, the delegation of approval authority over agency action to a joint legislative committee began with budgetary decisions. In the late 1940s, the legislature subjected appropriations for certain projects to final approval by a “joint legislative committee on retrenchment and reform,”⁴⁹ later called the “budget and financial control committee.”⁵⁰ Although this committee's authority was mentioned by the Iowa Supreme Court in a 1955 case, the only issue discussed relating to separation of powers was the legitimacy of delegating park selection authority to the state conservation commission.⁵¹

Eventually the review of particular budgetary decisions evolved into the systematic review of all agency rules. In 1951, the legislature began by giving the attorney general the authority to review all agency-proposed

48. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

49. Act of Apr. 22, 1947, ch. 29, § 1, 1947 Iowa Acts 46, 46–47; Act of Apr. 20, 1949, ch. 14, §1, 1949 Iowa Acts 37, 38.

50. Act of Feb. 15, 1951, ch. 44, § 1, 1951 Iowa Acts 75, 75–77 (codified at IOWA CODE § 2.41 (1954)).

51. *Mathiasen v. State Conservation Comm'n*, 70 N.W.2d 158, 160–61 (Iowa 1955).

rules to approve the “form and legality thereof.”⁵² That procedure lasted until 1961, when the legislature removed approval authority from the attorney general and, instead, required every new regulation to be submitted to the general assembly within the first thirty days of a new session.⁵³ The new rule would be “operative” in the meantime, but it would not become “permanent” until the end of the session, giving the legislature the opportunity to amend or reject it.⁵⁴

Review by the full legislature lasted only until 1963, when the general assembly created the first joint, bipartisan rules review committee.⁵⁵ While the committee could object to a rule, the agency had no obligation to respond to the objection.⁵⁶ The committee could refer a problematic rule to the full assembly for legislative action, but could take no action on its own that would affect the rule.⁵⁷ In 1967, the legislature once again required attorney general approval of the form and legality of all rules in addition to committee review.⁵⁸

Even the system that existed in 1967, which provided that the committee’s review was only advisory,⁵⁹ was deemed by Iowa’s attorney general to come “perilously close to encroachment by the legislative branch of our government upon both the executive and judicial branches.”⁶⁰ In response to a query from a legislator, the attorney general opined that a proposed amendment to the statute that would allow the general assembly to overturn regulations by concurrent or joint resolution would be unconstitutional because it would avoid the constitutional requirement of gubernatorial presentment.⁶¹ The attorney general cautioned against legislative interference with administrative rulemaking:

52. Act of Apr. 11, 1951, ch. 51, § 2, 1951 Iowa Acts 82, 82 (codified at IOWA CODE § 17A.2 (1954)).

53. Act of Apr. 21, 1961, ch. 60, § 1, 1961 Iowa Acts 96, 96 (codified at IOWA CODE § 17A.2 (1962)).

54. *Id.*

55. Act of May 16, 1963, ch. 66, § 2, 1963 Iowa Acts 101, 101 (codified at IOWA CODE § 17A.2 (1966)).

56. *See id.* §§ 7–9, at 102–03.

57. *Id.* §§ 10–11, at 103.

58. Act of May 18, 1967, ch. 92, § 8, 1967 Iowa Acts 124, 126 (codified at IOWA CODE § 17A.8 (1971)).

59. *See id.*; IOWA CODE § 17A.7 (1971).

60. 1967–1968 IOWA ATT’Y GEN. BIENNIAL REP. 78–79.

61. *Id.* at 79–80.

"[A]dministration of law, including exercise of the rule making power, is the proper function of the *executive*, rather than the legislative, branch of our government. Review of administrative rules is, except as heretofore stated, a function of the judicial branch of our government."⁶²

Not long thereafter, however, the legislature decided to increase its regulatory review powers. In 1972, the general assembly provided for the first time that, unless the rules review committee approved of the rule, the burden of proof would be on the agency in any subsequent action for judicial review.⁶³ Moreover, if the agency lost such a challenge, the agency would have to pay court costs, including reasonable attorney's fees.⁶⁴ This statute, therefore, marks the first time that a committee was invested with power to actually affect judicial review of an administrative rule.

In 1974, the Iowa General Assembly enacted the state's first comprehensive Administrative Procedure Act, to take effect in 1975.⁶⁵ The IAPA changed the name of this committee to the administrative rules review committee.⁶⁶ The Act allowed the committee or the attorney general to file an objection to a rule if they deemed it "unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to the agency."⁶⁷ The objection would be printed in the Iowa Administrative Code when the rule is codified.⁶⁸ Most importantly, if an objection is filed, "[t]he burden of proof shall then be on the agency in any proceeding for judicial review or for enforcement of the rule . . . to establish that the rule or portion of the rule timely objected to . . . is not unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to it."⁶⁹ The original provision allowed the committee to object only to a proposed

62. *Id.* at 80.

63. Act of Feb. 17, 1972, ch. 1018, § 1, 1972 Iowa Acts 30 (codified at IOWA CODE § 17A.17 (1973)).

64. *Id.*

65. Act of May 29, 1974, ch. 1090, 1974 Iowa Acts 165 (codified at IOWA CODE § 17A (1975)). For a discussion of the impetus for and history of the IAPA, see Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 732-54 (1975).

66. Act of May 29, 1974, ch. 1090, § 8, 1974 Iowa Acts 165, 170-171 (codified at IOWA CODE § 17A.8 (1975)).

67. *Id.* § 4(4), at 168-69 (codified at IOWA CODE § 17A.4(4) (1975)).

68. *Id.*

69. *Id.* at 169.

rule,⁷⁰ but in 1978, the statute was amended to allow an objection to any proposed or adopted rule.⁷¹

The term “burden of proof” may encompass both “the burden of producing evidence” and “the burden of persuading the fact finder,” although in some cases those two burdens may be allocated to different parties.⁷² In this case, however, determining whether a rule is valid would primarily be a question of law. Therefore, the legislature presumably intended for committee objections to negate the presumption of validity accorded to administrative regulations in ordinary judicial challenges contained in the IAPA, which places the burden of demonstrating the invalidity of agency action on the person challenging such action.⁷³ Thus, if the committee objects to an administrative rule, the burden of proof is on the agency, while in a judicial challenge without objection by the committee, governor, or attorney general, the burden is on the challenger.⁷⁴

In his article explaining the 1975 IAPA, Professor Arthur Bonfield, the principal draftsman of the IAPA,⁷⁵ noted that the power to reverse the burden of proof was added to the Act on the floor of the Iowa house “after lengthy debate.”⁷⁶ Bonfield stressed that this power did not give the ARRC authority to object to rules merely because committee members disagreed as a matter of policy: “such a power would permit these bodies to impugn otherwise lawful action taken by agencies pursuant to authorizations by a superior body, the legislature as a whole.”⁷⁷ Instead, the committee could object “only if that rule is deemed unreasonable, arbitrary, capricious or

70. *Id.* at 168–69.

71. *See* Act of June 27, 1978, ch. 1024, §§ 13–14, 1978 Iowa Acts 120, 123–25 (codified at IOWA CODE § 17A.4(2), (4) (1979)).

72. *Office of Consumer Advocate v. Iowa Utils. Bd.*, 454 N.W.2d 883, 888 (Iowa 1990).

73. *Compare* IOWA CODE § 17A.19(8)(a) (2011), *with* IOWA CODE § 17A.4(6) (2011).

74. *Compare* *Empire Cable of Iowa, Inc. v. Iowa Dep’t of Revenue and Fin.*, 507 N.W.2d 705, 707 (Iowa Ct. App. 1993) (noting that the burden is on the aggrieved or affected party to show that an agency’s actions are unreasonable), *with* *Barker v. Iowa Dep’t of Transp.*, 431 N.W.2d 348, 349 (Iowa 1988) (noting that after ARRC objection, the burden of proving regulation “is not unreasonable, arbitrary, capricious or beyond the authority delegated” shifts to the agency (quoting IOWA CODE § 17A.4(4)(a) (1987))).

75. Bonfield, *supra* note 65, at 749–54.

76. *Id.* at 905 (citing IOWA HOUSE JOUR. 1052–53 (Mar. 18, 1974)).

77. *Id.* at 908.

otherwise beyond" the agency's statutory authority.⁷⁸ Bonfield noted, however, that there was a danger that the committee would "be inclined to substitute their judgment as to the wisdom or desirability of the rules in question for that of the agency, and then cloak that judgment in the mantle of the statutory terms."⁷⁹ After all, the term "unreasonable" alone potentially connotes an aspect of policy decision.

In addition to shifting the burden of proof, the IAPA provides that an ARRC objection will result in the agency paying court costs to the prevailing party if a court holds the rule invalid.⁸⁰ Court costs are defined to include a reasonable attorney's fee, which is payable directly from the appropriations allocated to that agency.⁸¹ Bonfield notes that this provision "encourages aggrieved persons to litigate the validity of rules as to which a formal objection has been filed."⁸² Moreover, the potential financial outlay should "encourage[] an agency to seriously reconsider" a rule that has an objection filed against it.⁸³ Thus, the drafter of the ARRC provision acknowledged that an objection carried serious consequences for the agency⁸⁴ and, therefore, gave committee members significant power to affect the rulemaking process.⁸⁵

Subsequently, the ARRC was given two methods to delay the effectiveness of rules under review.⁸⁶ Under Iowa Code section 17A.4(7), upon a two-thirds vote, the committee "may delay the effective date of a rule [for] seventy days . . . only if further time is necessary to study and examine the rule."⁸⁷ This Article will refer to this device, added to the ARRC's powers in 1976,⁸⁸ as a "seventy-day delay."

In addition, the ARRC may delay the effective date of a rule until the

78. *Id.* (internal quotation marks omitted).

79. *Id.* at 909-10.

80. IOWA CODE § 17A.4(6)(b) (2011).

81. *Id.*

82. Bonfield, *supra* note 65, at 923.

83. *Id.*

84. *Id.*

85. *See id.* at 909-10.

86. Act of June 23, 1976, ch. 1063, § 2, 1976 Iowa Acts 77, 78 (codified at IOWA CODE § 17A.4 (1977)); Act of June 27, 1978, ch. 1024, § 19, 1978 Iowa Acts 120, 126 (codified at IOWA CODE § 17A.8(9) (1979)).

87. IOWA CODE § 17A.4(7) (2011).

88. Act of June 23, 1976, ch. 1063, § 2, 1976 Iowa Acts 77, 78 (codified at IOWA CODE § 17A.4 (1977)).

end of the next regular session of the general assembly.⁸⁹ This delay, which we will refer to as a “session delay,” also requires a two-thirds vote of the committee.⁹⁰ The rule is then referred to the appropriate standing committee to consider whether to propose legislation to amend or rescind the rule.⁹¹ If the legislature does not act on the rule, it becomes effective at the end of the session.⁹² This delay provision, added in 1978, originally provided for a delay of forty-five days during which the legislature was in session.⁹³ The provision was amended in 1986 to authorize the delay until the adjournment of the next regular legislative session.⁹⁴

In 1998, the legislature gave the ARRC the authority to demand that the agency conduct a regulatory analysis of a proposed rule.⁹⁵ The analysis must—unless expressly waived in the request for regulatory analysis—describe who will be benefitted and who will be burdened by the rule and compare its costs and benefits, along with possible alternatives.⁹⁶ The regulatory analysis also effectively delays the rule, because the public comment period must be extended until at least twenty days after a summary of the analysis is published.⁹⁷

Iowa was the first state to give a legislative committee burden-shifting authority. In his 1975 article analyzing the IAPA, Bonfield noted that at that time no other state gave a legislative committee the power to shift the burden of proof: “[T]he device of shifting the burden of proving a rule’s validity to the agency if it is properly objected to appears to be wholly an Iowa invention.”⁹⁸ Subsequently, five other states followed Iowa’s lead in shifting the burden onto the agency if the review committee properly objects.⁹⁹ Thus, the objection procedure authorized by Iowa, if not unique,

89. IOWA CODE § 17A.8(9) (2011).

90. *Id.*

91. *Id.*

92. *Id.*

93. Act of Apr. 17, 1978, ch. 1024, § 19, 1978 Iowa Acts 120, 126 (codified at IOWA CODE § 17A.8 (1979)).

94. Act of May 29, 1986, ch. 1245, § 2039, 1986 Iowa Acts 458, 690 (codified at IOWA CODE § 17A.8 (1987)).

95. Act of May 19, 1998, ch. 1202, § 10, 1998 Iowa Acts 611, 614–16 (codified at IOWA CODE § 17A.4A (2001)).

96. IOWA CODE § 17A.4A(2)(a) (2011).

97. *Id.* § 17A.4A(4).

98. Bonfield, *supra* note 65, at 917–18.

99. MINN. STAT. ANN. § 3.842(4a)(e) (West 2005); MONT. CODE ANN. § 2-4-406(4) (2011); N.H. REV. STAT. ANN. § 541-A:13(VI) (LexisNexis 2006 & Supp. 2011);

is at least very unusual. Delay authority is more common, but still relatively rare. The next section surveys the rule review mechanisms used in other states.

B. Rule Review Provisions in Other States

When the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Model State Administrative Procedure Act (MSAPA) in 1961, it did not include a provision for legislative review, because at that time only a few states had adopted such procedures, and the NCCUSL's experience with such provisions was too limited to permit a judgment on their merits.¹⁰⁰ In 1981, with Professor Bonfield as a reporter and draftsman, the revised MSAPA provided for an administrative rules review committee, which was a joint committee of both houses. However, the NCCUSL decided to limit this review committee's authority to recommending that a particular rule be overturned by statute.¹⁰¹ This limited-review provision, according to Bonfield,

expresses a consensus of the NCCUSL that the legislature should not be authorized to nullify or suspend an agency rule by means other than the enactment of a statute. . . . Because the legislature initially authorized agency rule making by the enactment of a statute, the legislature must use a statute to nullify or suspend a particular product of that process.¹⁰²

Conversely, the 1981 MSAPA provided for the objection procedure, which shifted the burden of proof to the agency in subsequent judicial review proceedings.¹⁰³

Although the objection procedure was adopted in a few states, most states continue to use a method of limited administrative rules review, which merely allows a review committee to recommend legislative action.¹⁰⁴

N.D. CENT. CODE § 28-32-17 (2006 & Supp. 2011); VT. STAT. ANN. tit. 3 § 842(b) (2010); *see also* discussion *infra* Part II.B.3.

100. BONFIELD, *supra* note 40, § 8.1.4 (citing 1 F. COOPER, STATE ADMINISTRATIVE LAW 221 (1965)).

101. MODEL STATE ADMIN. PROCEDURE ACT § 3-204(c), 15 U.L.A. 63 (1981).

102. BONFIELD, *supra* note 40, § 8.3.2(b).

103. MODEL STATE ADMIN. PROCEDURE ACT § 3-204(d)(5), 15 U.L.A. 64 (1981).

104. *See, e.g.*, MO. ANN. STAT. §§ 536.028, 536.037 (West 2008 & Supp. 2012); WASH. REV. CODE ANN. § 34.05.650 (West 2003 & Supp. 2012); *see* THE COUNCIL OF

As the sections below detail, some states have experimented with a variety of review techniques. However, only a few states intrude upon the executive branch as much as the Iowa procedure does.

1. *Legislative Veto*

Prior to *Chadha*, some states did authorize a legislative veto of administrative rules, either by joint legislative committee or concurrent resolution.¹⁰⁵ Many state courts held that such provisions were unconstitutional.¹⁰⁶ For example, the West Virginia Supreme Court of Appeals struck down a committee veto statute as a violation of separation of powers.¹⁰⁷ The Supreme Court of Alaska invalidated a statute that allowed the legislature to preserve veto power and override any executive veto.¹⁰⁸ In New Jersey, the state supreme court struck down a statute that allowed a veto by concurrent resolution on the ground that it impeded the executive's authority to execute the law and violated the presentment clause.¹⁰⁹ The Missouri Supreme Court struck down a statute allowing a joint legislative committee to nullify or suspend rules, finding the reasoning of *Chadha* persuasive.¹¹⁰

Connecticut has retained legislative committee veto power over regulations, but the procedure is specifically authorized by a constitutional amendment passed in 1982.¹¹¹ All rules must be submitted to a joint

STATE GOV'TS, 43 THE BOOK OF THE STATES, 167–69 tbl.3.26 (2011), available at <http://knowledgecenter.csg.org/drupal/content/book-states-2011-chapter-3-state-legislative-branch>. The following section is not intended to be an exhaustive state-by-state survey of state procedures. We used the chart produced by the Council of State Governments as a starting point and reviewed the identified states as having review procedures.

105. See BONFIELD, *supra* note 40, § 8.3.2(b) & n.29.

106. See generally Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1157, 1169 & n.98 (1992).

107. State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 636 (W. Va. 1981); see also State *ex rel.* Meadows v. Hechler, 462 S.E.2d 586, 594 (W. Va. 1995) (holding a later statute unconstitutional because it required the legislature to validate regulations).

108. State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 779 (Alaska 1980).

109. Gen. Assembly of N.J. v. Byrne, 448 A.2d 438, 448–49 (N.J. 1982).

110. Mo. Coal. for the Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 133–36 (Mo. 1997).

111. CONN. CONST. art. II (“[A]ny administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof . . .”), amended by CONN. CONST. amend. XVIII (effective Nov. 24, 1982).

regulation review committee, which then approves or disapproves of a rule, or rejects it “without prejudice,” which allows the agency to make revisions and resubmit the rule.¹¹² According to a recent study, the Connecticut committee very rarely exercises its power to reject rules outright, but the committee does disapprove about one-fourth of the rules submitted without prejudice.¹¹³ As described below, North Dakota also allows a legislative review committee to veto rules if they are arbitrary or fail to comply with legislative intent, among other things.¹¹⁴ We could find no constitutional challenges to this statute, perhaps because it is rarely used to reject a rule outright.

Illinois also allows a committee veto of regulations, but only in narrow circumstances.¹¹⁵ A joint legislative committee is empowered to object to rules on the basis that they go beyond statutory authority, are improper in form, or lack adequate notice.¹¹⁶ The agency may proceed despite the committee’s objection; however, the objection is noted in the official rules publication.¹¹⁷ The committee may veto a rule only when the rule “would constitute a serious threat to the public interest, safety, or welfare.”¹¹⁸

Louisiana allows the legislature to veto administrative rules by using a concurrent resolution.¹¹⁹ The state also empowers a review committee to object to rules,¹²⁰ which triggers the need for gubernatorial approval,¹²¹ as described below.¹²²

West Virginia’s legislature has engaged in a lengthy *pas-de-deux* with the state’s supreme court over review of rules. In 1981, the state supreme court held unconstitutional a statute that allowed a legislative committee to

112. CONN. GEN. STAT. ANN. § 4-170(c)–(e) (West 2007 & Supp. 2012).

113. Note, *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 628–30 (2007).

114. N.D. CENT. CODE § 28-32-18(1) (2006 & Supp. 2011); *see infra* Part II.B.3.

115. 5 ILL. COMP. STAT. ANN. 100/5-110(a) (West 2005).

116. *Id.*

117. *Id.* at 100/5-110(g).

118. *Id.* at 100/5-115.

119. LA. REV. STAT. ANN. § 49:969 (2003 & Supp. 2012).

120. *Id.* § 49:968(D)–(F).

121. *Id.* § 49:968(G).

122. *See infra* Part II.B.3.

veto proposed administrative rules.¹²³ The legislature then amended the review provisions to require all regulations to be submitted to the legislature for approval, where they would die in the absence of legislative action.¹²⁴ In 1995, however, the state supreme court held this provision to be unconstitutional because it unlawfully intruded on the executive function.¹²⁵ The court held that once the legislature delegates rulemaking power to the executive branch it must not interfere with the exercise of that power.¹²⁶ However, the legislature responded by simply withdrawing all rulemaking authority from the executive branch and requiring agencies to seek such authority on a rule-by-rule basis.¹²⁷ All rules are thus submitted to the legislature and the legislature must enact specific legislation authorizing them before they are considered valid.¹²⁸ From an agency standpoint, the ARRC procedure, while burdensome, would presumably be preferable to the West Virginia approach.

2. *Rule Suspension Authority*

Several states, including Alaska, Pennsylvania, and Ohio, give legislative committees temporary rule suspension authority.¹²⁹ Two early decisions on the constitutionality of rule suspension were mixed. The New Hampshire Supreme Court approved of this approach, finding that it simply allowed a reasonable opportunity for legislative action.¹³⁰ In contrast, the Kentucky Supreme Court held that even delaying a rule's effectiveness unlawfully intruded on the executive's authority.¹³¹

123. *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 636 (W. Va. 1981).

124. *See* W. VA. CODE ANN. § 29A-3-12(b) (LexisNexis 1994); *see also* *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 591-92 & n.17 (W. Va. 1995).

125. *Meadows*, 462 S.E.2d at 594.

126. *Id.* at 590-91.

127. *See* W. VA. CODE ANN. § 29A-3-2 (LexisNexis 2012).

128. *Id.* § 29A-3-12. For an overview of the rulemaking process in West Virginia, *see* *Summary of Regular Rule Making Steps*, W. VA. SECRETARY OF STATE, <http://www.sos.wv.gov/administrative-law/rulemaking/Pages/stepsummary.aspx> (last visited Oct. 24, 2012).

129. *See, e.g.*, ALASKA STAT. § 24.20.445 (2010); OHIO REV. CODE ANN. § 119.031 (LexisNexis 2007); 71 PA. CONS. STAT. ANN. § 745.6 (West 2012).

130. *See* *Opinion of the Justices*, 431 A.2d 783, 789 (N.H. 1981). New Hampshire no longer gives the committee delay powers, but it does allow an objection power, as discussed below. *See* N.H. REV. STAT. ANN. §§ 541-A:2, 541-A:13 (LexisNexis 2006 & Supp. 2011); *see also* *infra* Part II.B.3.

131. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 918-20 (Ky. 1984).

Meanwhile, in Michigan and South Dakota, specific constitutional provisions authorize legislative committee suspension of rules.¹³²

After the Alaska Supreme Court struck down the state's legislative veto statute,¹³³ the legislature adopted a review statute, which established a joint committee to review all new administrative rules.¹³⁴ The committee may no longer veto a rule; if it objects to a rule, it must propose a statute to reverse it and that statute must be enacted in the ordinary way.¹³⁵ If a new regulation is promulgated when the legislature is not in session, however, the committee has the power to delay the rule's effectiveness until thirty days into the next legislative session.¹³⁶

In Pennsylvania, a joint review committee reviews proposed rules to determine whether they are contrary to the public interest.¹³⁷ The committee may suspend the regulation on that basis, which allows the legislature time to consider a veto resolution.¹³⁸ Any veto resolution must follow normal procedures for the enactment of law, including presentment.¹³⁹

3. *Objection Authority*

Several states have "objection" statutes that shift the burden of proof in a manner similar to Iowa's process, and a couple states go even further. In Montana, the review committee may object if the rule is not within the scope of the agency's statutory grant of rulemaking authority,¹⁴⁰ or is not "reasonably necessary to effectuate the purpose of the statute," among other things.¹⁴¹ Similar to Iowa law, the objection results in shifting the burden of proof to the agency in subsequent litigation over the rule's validity.¹⁴² Unlike Iowa's fee-shifting provision, Montana's version provides

132. MICH. CONST. art. IV, § 37; S.D. CONST. art. III, § 30.

133. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 779 (Alaska 1980).

134. See ALASKA STAT. § 24.20.400.

135. *Id.* § 24.20.460(6).

136. *Id.* § 24.20.445.

137. 71 PA. CONS. STAT. ANN. § 745.5b (West 2012); see also David Pascal Zambito, Comment, *An "Irrc-some" Issue: Does Pennsylvania's Regulatory Review Act Violate the Separation of Powers?*, 101 DICK. L. REV. 643, 648-49 (1997).

138. 71 PA. CONS. STAT. ANN. § 745.6-7.

139. *Id.* § 745.7.

140. MONT. CODE ANN. §§ 2-4-305(3)-(5), 2-4-406(1) (2011).

141. *Id.* §§ 2-4-406(1), 2-4-305(6)(b).

142. Compare IOWA CODE § 17A.4(6) (2011), with MONT. CODE ANN. § 2-4-

that after an objection, the agency must pay court costs only if the court finds that “the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute,”¹⁴³ which makes the award of fees less likely in Montana. Although the objection procedure has been used at least once in Montana,¹⁴⁴ there does not appear to have been any litigation implicating the burden-shifting or fee-shifting aspects of the rule, nor has there been litigation with respect to the statute’s constitutional validity.

Vermont and New Hampshire have similar objection statutes. In Vermont, the joint review committee may object to a proposed rule on the ground it is arbitrary, “beyond the authority of the agency,” or contrary to legislative intent.¹⁴⁵ In New Hampshire, the grounds are that the rule is beyond the agency’s authority, contrary to legislative intent, not in the public interest, or has a substantial economic impact not recognized in the agency’s fiscal impact statement.¹⁴⁶ In both states, the objection shifts the burden of proof to the agency in subsequent litigation.¹⁴⁷ Neither state’s courts have ruled on the constitutionality of the objection authority. The only reported case in either state discussing the objection power is a 1992 New Hampshire Supreme Court decision applying the burden-shifting provision.¹⁴⁸ Attorney’s fees are not shifted in either state.

In Minnesota, either the bicameral legislative coordinating commission¹⁴⁹ or the policy committee of either house with jurisdiction over state governmental operations¹⁵⁰ may review rules and object to any found to be “beyond the procedural or substantive authority delegated to the agency.”¹⁵¹ After objection, the agency must respond in writing to the

406(4).

143. Compare IOWA CODE § 17A.4(6)(b), with MONT. CODE ANN. § 2-4-406(4).

144. See 44 MONT. OP. ATT’Y GEN. NO. 4, at *1–2 (1991), 1991 WL 578269 (discussing the committee’s objection to the Board of Public Education rule regarding talented and gifted students).

145. VT. STAT. ANN. tit. 3, § 842(b) (2010). The committee may also object if “the agency did not adhere to the strategy for maximizing public input prescribed by the interagency committee.” *Id.* § 842(b)(4).

146. N.H. REV. STAT. ANN. § 541-A:13(IV) (LexisNexis 2006 & Supp. 2011).

147. *Id.* § 541-A:13(VI); VT. STAT. ANN. tit. 3 § 842(b).

148. See *Toczko v. State*, 618 A.2d 800, 802 (N.H. 1992).

149. MINN. STAT. ANN. § 3.841 (West 2005).

150. *Id.* § 3.842(4a)(a).

151. *Id.*

commission.¹⁵² The commission may then decide to withdraw its objection, but if it does not, the burden shifts to the agency to establish the validity of the rule in any judicial review proceeding.¹⁵³ According to legal counsel for the commission, the objection power has not been used.¹⁵⁴

North Dakota more recently adopted Iowa's objection approach, but took it even further. Under North Dakota law, the rules committee may object to a rule it deems "unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency."¹⁵⁵ Just as in Iowa, the objection shifts the "burden of persuasion" in any subsequent litigation over the rule's validity, and the agency must also pay the challenger's court costs if it loses.¹⁵⁶ In addition, North Dakota's Administrative Agencies Practice Act allows the committee to void a rule for a variety of reasons, including that it fails to comply with legislative intent or is arbitrary and capricious.¹⁵⁷ Interestingly, the legislature anticipated constitutional issues with this committee veto authority, because it provided for a backup statute that would take effect only if the veto were declared unconstitutional.¹⁵⁸ The backup statute would allow the committee to suspend the problematic rule, which would then become effective only upon ratification by both houses of the assembly.¹⁵⁹ So far, North Dakota courts have not ruled on the constitutionality of the committee's powers.

North Carolina gave its review committee objection authority similar to Iowa's objection authority from 1977–1983,¹⁶⁰ at which point its review statute was repealed.¹⁶¹ A few years later, the legislature established a new Rules Review Commission (RRC), whose ten members are non-legislators, appointed by the legislative leaders of the two houses.¹⁶² The RRC reviews

152. *Id.* § 3.842(4a)(d).

153. *Id.* § 3.842(4a)(e).

154. E-mail from Paul M. Marinac, Deputy Revisor of Statutes, Minn. Office of the Revisor of Statutes, to author (July 17, 2012) (on file with author).

155. N.D. CENT. CODE § 28-32-17 (2006 & Supp. 2011).

156. *Id.* § 28-32-17(4).

157. *Id.* § 28-32-18(1).

158. See Act of Mar. 14, 2001, ch. 293, §§ 13, 36, 2001 N.D. Laws 3, 39–41, 49–50.

159. *Id.* § 13, at 39–41.

160. N.C. GEN. STAT. § 120-30.28 (1981) (repealed 1983).

161. Act of July 22, 1983, ch. 927, § 2, 1983 N.C. Sess. Laws 3, available at <http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/1983-1984/SL1983-927.pdf>.

162. N.C. GEN. STAT. § 143B-30.1(a) (2011). For a discussion of the history of rules review in North Carolina, see Charlotte A. Mitchell, Comment, *The North*

administrative rules to ensure they are “clear and unambiguous,” “within the authority delegated to the agency” and “reasonably necessary.”¹⁶³ Although the RRC’s determination was initially only advisory, the legislature in 1996 gave the commission veto power over agency rules.¹⁶⁴ At least one commentator believes that the authority given to the RRC violates the state’s separation of powers principles.¹⁶⁵ The RRC’s members are not legislators,¹⁶⁶ but they are appointed by the legislature, which seems to make them a legislative agency.¹⁶⁷ The North Carolina Board of Pharmacy challenged the constitutionality of the RRC’s authority, when the commission objected to a rule regulating the hours of pharmacists as beyond the Board’s statutory authority.¹⁶⁸ However, on appeal, the North Carolina Supreme Court did not reach the constitutional issue because it found the commission was in error and adequate statutory authority for the rule did exist.¹⁶⁹ Therefore, it was unnecessary to rule on the constitutionality of the RRC’s powers.¹⁷⁰

In Nevada, rules must be approved by a joint legislative committee¹⁷¹ before they become valid.¹⁷² If the committee objects to the rule on the basis that it goes beyond statutory authority, it does not carry out

Carolina Rules Review Commission: A Constitutional Quandary, 82 N.C. L. REV. 2092, 2098–2102 (2004).

163. N.C. GEN. STAT. § 150B-21.9(a) (2011). The commission must also ensure the agency adhered to the proper procedure. *Id.*

164. Act of July, 28, 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1719–20; see also Mitchell, *supra* note 162, at 2100.

165. Mitchell, *supra* note 162, at 2102 (opining that RRC authority “unlikely to withstand a constitutional challenge”).

166. N.C. GEN. STAT. § 120-123(1b) (2011).

167. Mitchell, *supra* note 162, at 2105–08.

168. N.C. Bd. of Pharmacy v. Rules Review Comm’n, 620 S.E.2d 893, 895 (N.C. Ct. App. 2005).

169. N.C. Bd. of Pharmacy v. Rules Review Comm’n, 637 S.E.2d 515, 515–16 (N.C. 2006) (per curiam) (adopting the dissenting opinion of the court of appeals regarding the adequacy of statutory authority). Under the court’s reasoning, as long as RRC objections may be appealed to a court, separation of powers issues are moot. Thus, the constitutionality of this authority may never be adjudicated in North Carolina. See *N.C. Bd. of Pharmacy*, 620 S.E.2d 893, 898–899 (2005) (Steelman, J., concurring in part and dissenting in part).

170. *N.C. Bd. of Pharmacy*, 637 S.E.2d at 515–16; *N.C. Bd. of Pharmacy*, 620 S.E.2d at 898–99 (Steelman, J., concurring in part and dissenting in part).

171. The joint committee consists of six senators and six assembly members and is called the “Legislative Commission.” NEV. REV. STAT. § 218E.150 (2011).

172. See *id.* § 233B.0675.

legislative intent, or it is not required by federal law, the rule is returned to the agency.¹⁷³ The agency may then submit a revised regulation, which is also subject to objection; this dance can apparently continue indefinitely, giving the committee an effective veto power.¹⁷⁴ This is one of the more powerful legislative review provisions, enacted in furtherance of a state constitutional amendment approved in 1996.¹⁷⁵ However, the amendment only gives the legislative committee the authority to review the rule and suspend it pending review by the entire legislature, which is then authorized to veto it by concurrent resolution.¹⁷⁶ Thus, if the committee holds up the rule indefinitely, it may be exceeding its constitutional authority.

In Florida, a legislative committee is empowered to object to agency rules after review.¹⁷⁷ Although the committee's objection is printed in the administrative bulletin along with the rule, it has no further effect.¹⁷⁸ Presumably, in any challenge to the rule, the Florida courts can decide what weight, if any, to give to the committee's objection. Similarly, in Nebraska the committee with jurisdiction over the agency can comment on a rule and those comments become part of the administrative record, to be considered by the court upon any review of the rule.¹⁷⁹

In Maryland and Louisiana, the committee's objection triggers the need for gubernatorial approval of the proposed rule. Maryland's Administrative Procedures Act established a joint legislative committee to review all proposed administrative rules.¹⁸⁰ If the committee objects, the rule must be approved by the governor to be valid, who is advised to consider the committee's objections.¹⁸¹ Therefore, the statute does not allow the committee to veto a rule, although the committee is empowered to affect the regulatory process on a case-by-case basis.¹⁸² This statute has not been challenged constitutionally. In Louisiana, oversight

173. *Id.* § 233B.067.

174. *See id.* § 233B.0675.

175. NEV. CONST. art. III, § 1, cl. 2.

176. *See id.*

177. FLA. STAT. ANN. § 120.545(2) (West 2008 & Supp. 2012).

178. *See id.* § 120.545(3)-(10).

179. NEB. REV. STAT. ANN. §§ 84-907.10, 84-906.01 (LexisNexis 2007).

180. *See* MD. CODE ANN., STATE GOV'T § 10-101(c) (LexisNexis 2009).

181. *Id.* § 10-111.1(d); *see* *Evans v. State*, 914 A.2d 25, 79-80 (Md. 2006) (applying MD. CODE ANN., STATE GOV'T § 10-111.1).

182. MD. CODE ANN., STATE GOV'T §§ 10-111(a), 10-111.1.

subcommittees of each standing committee review the proposed rules within their jurisdiction.¹⁸³ The subcommittees then determine whether the rule is consistent with the enabling legislation, in addition to determining the rule's "advisability" or "relative merit."¹⁸⁴ If the subcommittee objects to the rule, it may become effective only if the governor overrides the objection or if the agency changes the rule in a way that meets the subcommittee's approval.¹⁸⁵

Kentucky has a long history of providing legislative hoops for agencies to jump through in order to promulgate rules.¹⁸⁶ Under Kentucky law, a joint legislative committee may review and make nonbinding objections to proposed administrative rules if it finds them to be contrary to statutory authorization or unduly burdensome, among other things.¹⁸⁷ In 1984, the Kentucky Supreme Court held that a previous statute, which allowed the committee to veto rules, was an unconstitutional encroachment on the powers of the executive branch.¹⁸⁸ A later statute provided that the committee's adverse determination would establish a "prima facie case" regarding legislative intent in any judicial challenge to the regulation, and it specifically authorized the committee itself to institute such a case.¹⁸⁹ That provision was repealed in 2003,¹⁹⁰ and the committee's objection is now considered nonbinding.¹⁹¹ The Kentucky Administrative Procedures Act also contains a rather schizophrenic burden-shifting provision: administrative regulations are presumed valid, but if the regulation is challenged in court, the agency bears the burden of proving that the regulation is within its statutory authority.¹⁹² Note, however, that this burden-shifting provision applies to all rules challenged in court,¹⁹³ but the committee is not allowed to shift the burden on a case-by-case basis as in

183. LA. REV. STAT. ANN. § 49.968(D) (2003 & Supp. 2012).

184. *Id.* § 49.968(D)(3).

185. *Id.* § 49.968(G)–(H).

186. *See, e.g.*, KY. REV. STAT. ANN., ch. 13A (LexisNexis 2008); 2005 Ky. Acts 1067–1089; 1998 Ky. Acts 108–119, 1206–1208; 1996 Ky. Acts 693–707, 1083; 1984 Ky. Acts 1105–1118.

187. KY. REV. STAT. ANN. § 13A.030 (LexisNexis 2008).

188. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 930–31 (Ky. 1984).

189. KY. REV. STAT. ANN. § 13A.032 (LexisNexis 2000) (repealed 2003).

190. Act of Mar. 31, 2003, ch. 185, § 12, 2003 Ky. Acts 1996.

191. KY. REV. STAT. ANN. § 13A.030(2) (LexisNexis 2008).

192. *See id.* § 13A.140.

193. *See id.*

Iowa's law.¹⁹⁴

C. Conclusion

Iowa is not alone in giving a legislative committee review authority over agency rulemaking. While in most states the committee merely has the advisory authority to recommend legislation, a few states give the committee authority to delay the rule. Several states have objection authority similar to Iowa's, which shifts the burden of proof in subsequent proceedings. The vast majority of states, however, do not provide for the degree of legislative influence on the administrative process allowed by Iowa's ARRC procedure.

III. EFFECTIVENESS OF ARRC REVIEW

A. Policy Reasons for ARRC Review Authority

In order to evaluate the effectiveness of the ARRC procedure, we should review the reasons the legislature adopted the review scheme. The committee fulfills one of the purposes for the IAPA set out in Section 17A.1(3): "[t]o provide legislative oversight of powers and duties delegated to administrative agencies."¹⁹⁵ Professor Bonfield suggests: "Implicit in that purpose is a certain amount of legislative distrust of administrative agencies' conduct, and an intention to retain a measure of control over the powers delegated to the various bodies in the administrative branch of government."¹⁹⁶ Because the legislature as a whole cannot monitor the agencies' actions, Bonfield believed that some mechanism for review by committee was a "practical necessity."¹⁹⁷

The authority given to the review committee furthered Bonfield's political view of rulemaking. In the introduction to his book on state administrative law, Bonfield explains that agency rulemaking may be considered as either "technocratic" or "political."¹⁹⁸ In the technocratic view, "the process by which agencies make law ensures that judgments of expert agencies within the scope of their legal authority are crystallized, legitimized, and implemented without interference by persons outside the

194. See *supra* notes 73–74 and accompanying text.

195. IOWA CODE § 17A.1(3) (2011).

196. Bonfield, *supra* note 65, at 896.

197. BONFIELD, *supra* note 40, § 8.3.3(k).

198. *Id.* § 1.1.2 (citations omitted) (internal quotation marks omitted).

agency.”¹⁹⁹ In such a model, rulemaking should be insulated from political influences to promote the “proper resolution of problems by the official experts.”²⁰⁰

In contrast, Bonfield supported a political model of rulemaking, which would allow public opinion to carry more weight.²⁰¹ Even if a rule made sense, “the will of the agency experts should be subordinated to the will of the people, even if the latter is unwise, uninformed, or even irrational.”²⁰² A political model of rulemaking will create more opportunities “for public political pressures to shape the product of administrative law making.”²⁰³ That is precisely what the ARRC process does.

In his influential treatise on state administrative rulemaking, Professor Bonfield outlined the advantages and disadvantages of legislative review of administrative rules.²⁰⁴ The advantages he identified can be summarized as follows:

1. Legislative review provides an appropriate political check on the administrative rulemaking process.²⁰⁵ Judicial review does not provide an effective political check on rulemaking since courts do not rule on whether agency rules are politically acceptable to the public.²⁰⁶ This kind of political check is desirable because even though we allow agencies, by necessity, to make policy decisions,

199. *Id.*

200. *Id.*

201. *Id.* at 8–9.

202. *Id.* at 9.

203. *Id.*

204. *Id.* § 8.1.2–3. Bonfield’s treatise also includes a discussion on the advantages of gubernatorial review of rulemaking. *Id.* But, whether the governor should be empowered to veto administrative rules is another subject, beyond the scope of this Article. However, we note that the governor has other methods of influencing agency officials, including his or her powers of appointment and removal. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2.

205. BONFIELD, *supra* note 40, § 8.1.2.

206. *Id.* § 8.1.1–2. Of course, Bonfield also emphasizes elsewhere that the ARRC will not be able to object to rules for purely political reasons, but must constrain their objections to those that are truly unreasonable, arbitrary, or beyond the agency’s authority. *See id.* § 8.3.3. The ARRC should not be able to take any action against a rule based solely on its unpopularity. *See id.* As long as the agency’s policy choice is reasonable and within statutory bounds, this political check would be ineffective, assuming that the ARRC is not misusing its authority. *See id.*

such decisions should at least be subject to the same political check as the lawmaking processes for which they are a substitute.²⁰⁷ The legislature gives broad delegations of authority to agencies without prior knowledge of how the agency will interpret and implement that authority, so “it may make sense to require an external check . . . as a means of ensuring that the rule-making process is subject to the same political checks as the statute-making process.”²⁰⁸

2. The legislature is politically accountable; therefore it, rather than unelected “technocrats,” should decide issues of policy.²⁰⁹
3. The legislature is the source of agency rulemaking authority, so it should be able to police the agencies to ensure that an agency is not exceeding the limits of its delegated authority.²¹⁰
4. Only the elected branches can effectively coordinate policy among the various agencies.²¹¹
5. The legislature can provide a more effective check on unlawful rulemaking than the judicial process can because its review is faster, cheaper, and not limited by restrictive review standards.²¹² Persons affected by unlawful rulemaking should not have to pay for the high cost of judicial review when they could get free review by elected officials.²¹³
6. Agencies themselves benefit from review because they are provided with “input that will help them better perform their rule-making responsibilities.”²¹⁴

207. *Id.* § 8.1.2.

208. *Id.*

209. *Id.*; see also Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, FLA. ST. U. L. REV. 617, 651–52 (1990) (stating that legislative committee members “are directly accountable to the public at the polls and represent the body that created the agency and vested it with . . . authority”). As between the agency and “an authorized representative of the lawgiver,” the latter should be preferred in a disagreement about the scope of agency power. Bonfield, *supra*, at 652.

210. BONFIELD, *supra* note 40, § 8.1.2.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

In a later article, Bonfield suggested that giving the ARRC significant review authority was desirable because agencies have an inherent tendency to construe their authority broadly.²¹⁵ Therefore, the committee is a more reliable barometer of the proper scope of the agency's authority; if the ARRC objects, "there are good grounds to believe that the rule is or may be unlawful," which justifies the burden-shifting.²¹⁶ Although a court will make the final decision, "[t]he mere existence of this mechanism is likely to cause agencies to think twice before adopting rules of doubtful legality."²¹⁷

Bonfield also recognized that the legislative review process could have disadvantages, which may be summarized as follows:

1. Agencies are entrusted with rulemaking authority because they are experts in their fields and have more time to study the problems that their rules are meant to address.²¹⁸ "Neither the governor nor the legislature can" match the time or expertise of the agency and consequently "will not be able to consider adequately the arguments on all sides of all rules."²¹⁹
2. Review might be used to replace the agency's considered judgment with "undue political pressures or irrational popular passions."²²⁰ Thus, the process may be used by opponents to renew policy battles they already lost during the original legislative debate.²²¹
3. Review could be applied unevenly, with some agencies disfavored by the legislature or governor being subjected to closer scrutiny.²²²
4. Constant and intense review may encourage agencies to avoid the rulemaking process and rely instead on "ad hoc adjudication," which is undesirable because it avoids broad public participation.²²³
5. The review process might reduce judicial scrutiny because the

215. Bonfield, *supra* note 209, at 652–53.

216. *Id.* at 652.

217. *Id.* at 653.

218. BONFIELD, *supra* note 40, § 8.1.3.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

judiciary knows rules have already been reviewed by the legislature.²²⁴ In addition, some rule opponents might simply forego active participation in the rulemaking process, knowing that they can use legislative or gubernatorial influence to defeat the rule later.²²⁵

Weighing these advantages and disadvantages, Bonfield concluded that “the reasons for favoring the creation of such a [review] scheme are clearly compelling.”²²⁶ He emphasized that it made sense to allow the political branches to ensure that the rulemaking accurately “reflects the letter and spirit of their enabling legislation.”²²⁷ In fact, he believed that such review was “necessary to ensure the legitimacy of the rule-making process.”²²⁸ In sum, the review process implemented Bonfield’s vision of a political approach to rulemaking, rather than a technocratic approach.²²⁹

Professor Auerbach was an early critic of Bonfield’s ideas on legislative review of agency rulemaking.²³⁰ Auerbach cautioned that giving a legislative committee too much power would divest the agency of the discretion given by a particular statutory enactment and allow a small group of legislators to undermine the authority given by the whole legislature.²³¹ Instead of being more responsive to public opinion, Auerbach feared the review process would “give undue weight to the interest groups that could afford to maintain continuous contacts with the committee and its staff.”²³²

Bonfield thought that such dangers could be avoided by confining the committee’s objection power to narrow grounds—only when the rule was clearly unreasonable, arbitrary, capricious, or beyond the agency’s

224. *Id.*

225. *Id.*

226. *Id.* § 8.1.4; *but see* Zambito, *supra* note 137, at 654.

227. BONFIELD, *supra* note, 40 § 8.1.4.

228. *Id.*

229. Compare Bonfield, *supra* note 65, at 749–54 (detailing Professor Bonfield’s influential role in drafting the IAPA), with BONFIELD, *supra* note 40, § 1.1.2 (opining that the political approach is best).

230. See Carl A. Auerbach, *Bonfield on State Administrative Rulemaking: A Critique*, 71 MINN. L. REV. 543 (1987). Auerbach’s discussion refers to the review powers set forth in the MSAPA, which proposed an objection power similar to Iowa’s. *Id.* at 543–44; *see also* BONFIELD, *supra* note 40, § 8.3.1(e).

231. Auerbach, *supra* note 230, at 568.

232. *Id.*

statutory authority.²³³ The committee would not be allowed to object based only on policy disagreements with the agency's approach.²³⁴ Bonfield recognized that this restriction could be ineffective, because "a committee might be inclined to substitute its judgment as to the desirability of a rule for that of the agency, and then cloak that judgment in the mantle of the statutory terms."²³⁵ Nevertheless, he believed that the benefits of the approach outweighed this risk.²³⁶

Auerbach, on the other hand, believed that Bonfield was underestimating the dangers inherent in giving the committee the objection power. He believed that an agency would be inclined to "heed the committee's wishes in most cases,"²³⁷ given its significant arsenal of weapons, which would diffuse accountability for the result:

At the very least, the review process will encourage negotiation between committee and agency staffs that may produce compromises the agency would not otherwise have accepted. Concurrent negotiations with the governor's administrative rules counsel may reinforce the legislative committee's position and add to the pressures on the agency or produce deadlocks.

....

These dynamics are more important than shifting the burden to the agency to establish the validity of a challenged rule whenever the agency has refused to heed the committee's objection. The shifting of the burden may not, itself, have an in terrorem effect upon the agency, but the consequences of the shifting will have to be considered by the agency along with all the political implications of the legislative review process. Although Bonfield views these implications as implementing effectively the political model of rulemaking, their consequences may be even more undesirable than the legislative veto. The veto at least fixes responsibility on the legislative body exercising it. The committee

233. BONFIELD, *supra* note 40, § 8.3.3.

234. *Id.*; see also Auerbach, *supra* note 230, at 568.

235. BONFIELD, *supra* note 40, § 8.3.3; see also Auerbach, *supra* note 230, at 568.

236. BONFIELD, *supra* note 40, § 8.3.3; see also Auerbach, *supra* note 230, at 568-69.

237. Auerbach, *supra* note 230, at 569.

review process may operate effectively behind the scenes.²³⁸

Auerbach emphasized the other negative consequences of the review from a policy perspective:

Finally, to give the administrative rules committee of the legislature power to check illegal agency rulemaking is to give it authority traditionally exercised by the courts, which it is not nearly as competent as the courts to exercise. Furthermore, . . . the likelihood is that reviewing courts will not scrutinize an ultra vires challenge as carefully when there is no committee objection to a rule as when there is an objection. There will be even less of a judicial “hard look” if the committee failed to object to a rule after instituting a public proceeding to assist it in its review. Persons affected by agency rules may come to rue this consequence of the legislative review process and have added reason to maximize the political pressures on the committee.²³⁹

In addition to Auerbach’s critique, Bonfield’s view that the ARRC procedure is more democratic is debatable on other grounds. The committee, after all, is only a small subset of the entire legislative body.²⁴⁰ The ARRC legislators may not be representative of the views of the legislature as a whole and may use the committee to pursue policy goals that would not survive in the crucible of the legislative process. Moreover, the statute giving the agency rulemaking authority may have been enacted by an earlier legislature—in some cases, much earlier²⁴¹—which makes current legislators unreliable interpreters of legislative intent.

Many of the problems with the ARRC procedure are similar to concerns raised about the legislative veto. For example, one criticism of the veto procedure was that it reduced the quality of administrative rulemaking by “shift[ing] power from interested members of the public and from experienced agencies to generalists in the legislature or on the committee staff.”²⁴² In fact, the legislature’s veto authority was “susceptible

238. *Id.* at 569–70 (footnotes omitted).

239. *Id.* at 570.

240. *See* IOWA CODE § 17A.8(1) (2011).

241. *See, e.g.,* Act of May 29, 1974, ch. 1090, 1974 Iowa Acts 165 (codified at IOWA CODE ch. 17A (1975)) (evidencing the IAPA was passed by the sixty-fifth Iowa General Assembly in 1974, while the eighty-fifth Iowa General Assembly will begin in January 2013).

242. *See* David S. Neslin, Comment, *Quis Custodiet Ipsos Custodes?*:

to abuse by powerful legislators with parochial interests and by influential interest groups acting contrary to the public interest.”²⁴³ Although the ARRC is not armed with veto authority, its powers similarly “facilitate over-involvement by the legislature in the daily administration of agency programs, and allow the committee or legislature acting alone to narrow the scope of agency discretion. This subverts the more representative and formal statutory process, with its built-in checks and balances.”²⁴⁴ Finally, one critic noted that veto authority reduced the power of the governor.²⁴⁵ Similarly, a governor of Iowa may have signed legislation simply because he or she believed the agency would interpret its authority in a certain way.²⁴⁶ ARRC authority allows a small group of legislators to undermine the gubernatorial ability to determine how the law will be carried out.²⁴⁷

Overall, it is not clear that democracy is served by the ARRC procedure, despite the drafter’s desire to put policy choices in the hands of elected officials rather than technocrats.²⁴⁸ While agency officials are not elected, the governor who appointed the department head is, and he or she will be held politically accountable for the agency’s decisions.²⁴⁹ The ARRC process simply muddies the waters of accountability, leaving the public uncertain about where responsibility for the final product should lie. In fact, while a citizen can certainly vote against the governor for an unreasonable agency rule, many citizens may be unable to vote against any of the small cadre of legislators who make the ARRC decisions, unless one happens to be in their district. Instead of politicizing the process, modern rulemaking ought to recognize that these decisions are better left in the hands of those with expertise.²⁵⁰ The judicial branch can then police the boundaries of discretion set by the legislature and ensure that the rulemaking process is open and fair.²⁵¹ In fact, the modern rulemaking

Gubernatorial and Legislative Review of Agency Rulemaking Under the 1981 Model Act, 57 WASH. L. REV. 669, 689–90 (1982).

243. *Id.* at 690 (footnote omitted).

244. *Id.*

245. *Id.* at 691.

246. *See* Bonfield, *supra* note 209, at 640–41.

247. *See, e.g.,* Neslin, *supra* note 242, at 690–91 (describing how an Alaskan governor could not prevent a legislative exemption “without risking legislative invalidation of the statute by concurrent resolution”).

248. *See* BONFIELD, *supra* note 40, § 8.1.2.

249. *Id.* § 8.2.10.

250. *Id.* § 8.1.3.

251. *See* Auerbach, *supra* note 230, at 570.

process often seems more democratic than the legislative process because any citizen can submit comments or address the agency at a hearing and the agency must respond to those concerns rationally;²⁵² a legislator, however, is under no such constraint and instead may be making decisions based on incomplete or inaccurate information supplied by lobbyists.²⁵³

The political view of rulemaking is premised on the notion that agency decisions are often composed of two types of questions: one calls for technocratic expertise, while the second is purely a matter of policy.²⁵⁴ For example, assume that the law requires an agency to avoid an undue impact on endangered species when building a highway. The question of how much impact a particular highway will have on the Ornate Box Turtle is a scientific question, as is an assessment of how much it would cost to move the highway to a different location. But the question of whether the cost is worth avoiding the impact is a matter of policy, which should be subject to political influence. It might be preferable to have all such policy decisions made by the legislature, and it is free to decide whether to delegate those decisions to the agency or not.²⁵⁵ If it does delegate the policy choices, the legislature is required to provide adequate guidance, or an "intelligible principle,"²⁵⁶ and the legislature is free to tighten or alter that guidance if it is not happy with the agency's choices.²⁵⁷ But what it may not do is delegate the policy decisions to a subset of the legislature.

An early empirical study of state rule review committees found that the mechanism tended to reduce regulatory stringency, which is perhaps the chief aim.²⁵⁸ However, the reasons for this are profoundly undemocratic; the study's author noted that legislative committee hearings are "not as broadly representative as the hearings in which the administrative action was originally proposed."²⁵⁹ Moreover, the addition of another procedural step in regulatory approval raises the total cost of public participation, giving better-funded regulated entities an advantage

252. See IOWA CODE § 17A.3–4 (2011).

253. BONFIELD, *supra* note 40, § 6.4.1.

254. See *id.* § 1.1.2.

255. See, e.g., IOWA CONST. art. III, div. 2, § 1.

256. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (internal quotation marks omitted).

257. See, e.g., IOWA CODE § 17A.8(8)–(9).

258. Marcus E. Ethridge, *Consequences of Legislative Review of Agency Regulations in Three U.S. States*, 9 LEGIS. STUD. Q. 161, 173 (1984).

259. *Id.* at 163.

over citizen groups.²⁶⁰ Finally, but perhaps most importantly, agency officials are less likely, compared to the legislative committee, to be influenced by campaign donations and are more likely to make their decisions based on a neutral evaluation of the public interest.²⁶¹ Another political scientist summarized the evidence of inherent bias of review committees: "Because public interest groups have proved effective in the administrative regulatory process, regulated and client groups have turned to oversight mechanisms for relief. Regulated and client groups have successfully converted legislative rule review committees into 'grievance appeal boards,' resulting in decreased regulatory aggressiveness."²⁶²

The early debate over the desirability of the ARRC procedure took place in the absence of empirical data on how the review authority would be used in practice.²⁶³ Now that we have several decades of experience with the provisions, it should be easier to evaluate the scheme's advantages and disadvantages through empirical data. The next section reviews the recent history of ARRC actions to draw some conclusions about the committee's impact on the rulemaking process.

B. Empirical Evidence of ARRC Actions

We compiled the data used for this analysis from fifteen years of ARRC Annual Reports (1996–2010) provided by Administrative Rules Coordinator Joe Royce.²⁶⁴ The ARRC was created in 1974 and became functional in 1975.²⁶⁵ The committee was unable to locate the annual reports for the years 1975–1995. Nevertheless, the later reports contained some historic data, at least allowing us to discover the total number of ARRC-imposed delays and objections dating back to 1975.²⁶⁶ Based on the data available, we are able to identify some patterns in the behavior of the ARRC and the agencies with which it interacts. Our data set begins to sketch a portrait of how the ARRC functions, and what effect it has on the

260. *Id.*

261. *See id.*

262. *Id.* (quoting Marcus E. Ethridge, *A Political-Institutional Interpretation of Legislative Over-sight Mechanisms and Behavior*, 17 *POLITY* 340, 349 (1984); Ethridge, *supra* note 259, at 163) (internal quotation marks omitted).

263. *See* BONFIELD, *supra* note 40, § 8.1.4.

264. 1996–2010 ARRC ANN. REPS.

265. Act of May 29, 1974, ch. 1090, §§ 8, 24, 1974 Iowa Acts 165, 170, 180 (codified at IOWA CODE § 17A.8 (1975)).

266. *See* 1996 ARRC ANN. REP. 3.

rulemaking process in Iowa.²⁶⁷

1. *Agency Rulemaking Activity*

A wide variety of administrative entities in Iowa have rulemaking authority. The organization of the executive branch in Iowa begins with principal administrative entities known as “departments.”²⁶⁸ This category includes, for example, the Department of Administrative Services, the Department of Agriculture and Land Stewardship, and the Department of Inspections and Appeals.²⁶⁹ The Iowa Code lists twenty-two “central” departments in the executive branch.²⁷⁰ The departments are then divided into divisions, bureaus, sections, or units for more economic and efficient operation.²⁷¹ For example, the Department of Commerce is divided into five divisions—the Alcoholic Beverages Division, the Iowa Division of Banking, the Iowa Credit Union Division, the Iowa Insurance Division, and the Iowa Utilities Board²⁷²—all of which have rulemaking authority.²⁷³ In addition, the executive branch includes commissions, independent agencies, and boards that are not within a particular department, but have rulemaking authority.²⁷⁴ For example, the Iowa State Civil Rights Commission²⁷⁵ and the Iowa Ethics and Campaign Disclosure Board²⁷⁶ are independent agencies, yet they still have rulemaking authority. As of 2010, the ARRC counted “125 executive branch administrative agencies: 21 umbrella departments, 46 semi-autonomous divisions, bureaus, and other entities within those departments, 27 licensing boards, 26 independent agencies, and 4 separate constitutional offices.”²⁷⁷ For simplicity’s sake we

267. All statistical references in the text of this section will refer to the fifteen years of available data from the 1996–2010 ARRC Annual Reports, unless otherwise noted. Given the partial data we have from the earlier years, we believe the trends we have identified are representative of how the committee has operated over the course of its existence.

268. IOWA CODE § 7E.4(6) (2011).

269. *Id.* § 7E.5.

270. *Id.*

271. *Id.* § 7E.4(7).

272. *Id.* § 546.2(3).

273. *Id.* § 546.2(5)(a).

274. *Id.* § 7E.4(2), (3), (9).

275. *Id.* §§ 216.3, 216.5.

276. *Id.* § 68B.32.

277. 2010 ARRC ANN. REP. 1. In 1996, the report counted 109 such entities. 1996 AARC ANN. REP. 1.

will refer to all of these entities as “agencies” throughout this section despite the differences in their technical classifications.

In order to initiate the rulemaking process, an agency must file a notice of intended action (NOIA) with the administrative rules coordinator (ARC), who assigns the proposal an ARC number.²⁷⁸ The notice, which must contain the substance of the intended action and procedures for hearing and comment, is then published in the administrative bulletin.²⁷⁹ The notice must be filed at least thirty-five days prior to the action.²⁸⁰ If the agency “for good cause finds that notice and public participation would be unnecessary, impracticable, or contrary to the public interest,” it may file the rule on an emergency basis, dispensing with the notice and comment requirements.²⁸¹ The rule is then filed in final form with the ARC.²⁸² The term “filing” used in this section refers to the rulemaking filed in final form.²⁸³ Many notices do not result in final rulemaking filings; the ARRC estimates that there are roughly twice as many NOIAs as final filings.²⁸⁴

A filing may contain a comprehensive revision of numerous rules, or it may contain only one minor amendment to a subparagraph of one rule.²⁸⁵ In 1996, for example, the 392 filings comprised a total of about 1600 additions, amendments, or repeals of individual rules.²⁸⁶ The ARRC data does not attempt to keep track of total rules affected, but rather treats each filing as one rulemaking action.²⁸⁷

Over the fifteen-year study period, 116 agencies²⁸⁸ filed a total of 6485

278. IOWA CODE § 17A.4(1)(a).

279. *Id.*

280. *Id.*

281. *Id.* § 17A.4(3).

282. *Id.* § 17A.5(1).

283. *See id.*

284. *See* 1996 ARRC ANN. REP. 1.

285. *See id.*

286. *Id.*

287. *Id.*

288. 2010 ARRC ANN. REP. 1; 2000 ARRC ANN. REP. 1. Over the course of the study period, a limited amount of reorganization occurred; new agencies were added, some agencies changed names, merged into other departments, or ceased to exist. We found that it was impossible to accurately track the lineage of every agency and thus treat the new agency separately when these changes occurred, even if it is somewhat related to a former agency.

rulemaking actions.²⁸⁹ As shown in Table 1, in any given year, the number of agencies filing rulemaking actions varied between a low of fifty agencies in 1997²⁹⁰ to a high of eighty-one agencies in 1999.²⁹¹ The 1996 report provides basic data back to 1987, so we are able to see that the number of agencies engaging in rulemaking was similar in that earlier period, with a high of eighty-six in 1988.²⁹² The number of rulemaking filings over the entire period ranged from a high of 621 in 1988 to a low of 367 in 2000.²⁹³ The average number of filings over our study period (1996–2000) was 432 per year.²⁹⁴ As shown in Graph 1, below, there have been some peaks and valleys in the filing trends over the period of 1987–2010. The number of filings in the late 1980s and early 1990s was significantly higher than in the mid-1990s.²⁹⁵ This may have reflected the antiregulatory mood during the mid-1990s at the national level, symbolized by the Republican Contract with America during the 1994 congressional election.²⁹⁶ In any case, in the last five years of our data, the average has been 450 actions per year,²⁹⁷ roughly halfway between the two extremes.

TABLE 1

YEAR	AGENCIES	FILINGS
1987	60	503
1988	86	621
1989	60	463
1990	56	498
1991	66	511
1992	61	493
1993	62	493

289. 2010 ARRC ANN. REP. 1; 2000 ARRC ANN. REP. 1.

290. 1997 ARRC ANN. REP. 1.

291. 1999 ARRC ANN. REP. 1; *see also* 2010 ARRC ANN. REP. 1; 2000 ARRC ANN. REP. 1.

292. 1996 ARRC ANN. REP. 1.

293. 2010 ARRC ANN. REP. 1; 2000 ARRC ANN. REP. 1.

294. *See* 2010 ARRC ANN. REP. 1; 2000 ARRC ANN. REP. 1.

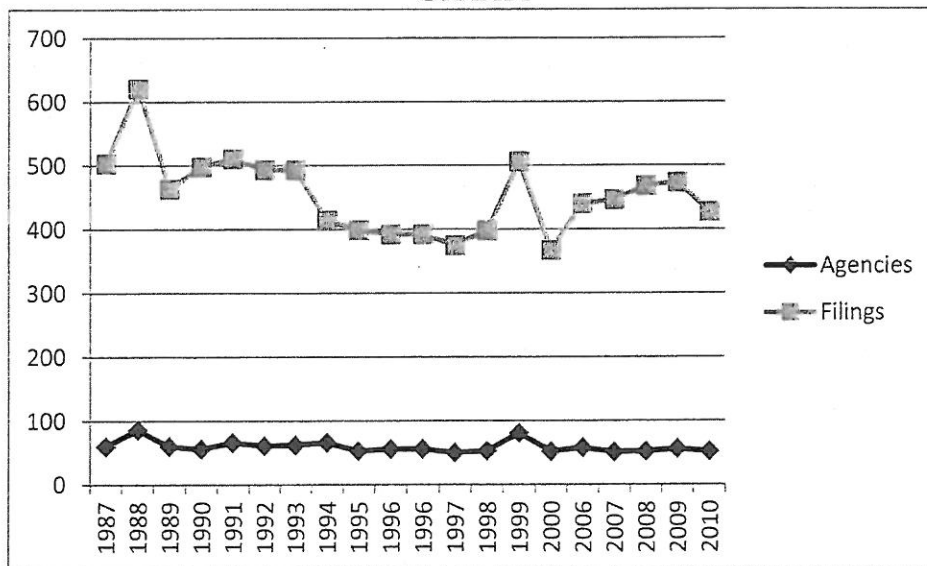
295. *See* 1996 ARRC ANN. REP. 3 (listing the number of filings from 1987–1993, with an annual average of 511); *see also* 1999 ARRC ANN. REP. 1 (listing the number of filings from 1994–1998, with an annual average of 395).

296. Michael Weisskopf & David Maraniss, *Forging an Alliance for Deregulation; Rep. DeLay Makes Companies Full Partners in the Movement*, WASH. POST, Mar. 12, 1995, at A01.

297. *See* 2010 ARRC ANN. REP. 1.

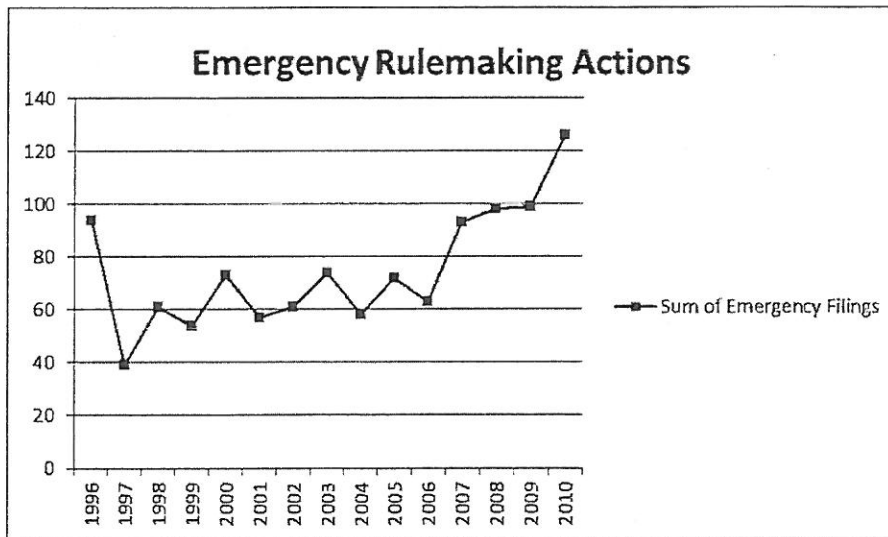
1994	66	414
1995	53	399
1996	56	392
1997	50	375
1998	53	398
1999	81	506
2000	52	367
2001	64	419
2002	59	523
2003	54	435
2004	56	420
2005	54	396
2006	58	440
2007	51	446
2008	52	468
2009	56	473
2010	52	427

GRAPH 1



Seventeen percent (1118) of the 6485 rulemaking actions over the fifteen-year study period were filed on an “emergency” basis²⁹⁸ in accordance with the IAPA.²⁹⁹ As noted above, in certain circumstances the IAPA allows the agency to defer the comment period³⁰⁰ and make the rule immediately effective.³⁰¹ As Graph 2 illustrates below, the number of emergency filings has increased significantly in recent years. From 2001 to 2006, the number of emergency filings averaged sixty-five per year and about 15% of all filings.³⁰² The number increased significantly thereafter to 93 in 2007, 98 in 2008, 100 in 2009, and 113 in 2010, which represented nearly one-quarter of all filings in those years.³⁰³ Almost all of these were “double barreled” filings, which means a regular rule is filed at the same time as the emergency rule, so the rule will be effective during the notice and comment period.³⁰⁴ Because of this, there may be less fear that the agencies are misusing the emergency procedure.

GRAPH 2



298. See 2010 ARRC ANN. REP. 2; 2000 ARRC ANN. REP. 1.

299. IOWA CODE §§ 17A.4(3), 17A.5(2)(b) (2011).

300. *Id.* § 17A.4(3).

301. *Id.* § 17A.5(2)(b).

302. See 2010 ARRC ANN. REP. 1–2. Emergency filings were the following for years 2001 to 2006: 57, 64, 73, 59, 72, 65. *Id.*

303. *See id.*

304. *Id.*

Of the 116 agencies filing rules over the study period, only sixty-five agencies filed more than ten rules.³⁰⁵ These sixty-five agencies accounted for 97% of the rules filed (6315).³⁰⁶ Thirty-four agencies filed fewer than five actions over the fifteen-year period.³⁰⁷ As Table 2 shows, the Human Services Department, whose jurisdiction ranges from Medicaid to Food Assistance to Mental Health services,³⁰⁸ leads the agencies with 1073 total filings during this period.³⁰⁹ Two subparts of the Department of Natural Resources (DNR)—including the Natural Resources Commission (NRC) and the Environmental Protection Commission (EPC)—filed over 600 rulemaking actions combined.³¹⁰ The Professional Licensing Division and the Public Health Department had over 300 actions each.³¹¹

TABLE 2
Top 20 Rulemaking Agencies³¹²
1996–2010

Agency	Total Filings	Emergency Filings
Human Svcs. Dept.	1073	323
Prof. Lic. Div.	385	38
Nat'l Resources Comm'n	334	28
Pub. Health Dept.	322	50
Envir. Protect. Comm'n	274	41
Econ. Devel. Dept.	242	63

305. See 2010 ARRC ANN. REP. app. a at 8–10; 2009 ARRC ANN. REP. app. a at 9–12; 2008 ARRC ANN. REP. app. a at 7–10; 2007 ARRC ANN. REP. app. a at 7–9; 2006 ARRC ANN. REP. app. a at 10–13; 2005 ARRC ANN. REP. app. a at 10–12; 2004 ARRC ANN. REP. app. a at 9–10; 2003 ARRC ANN. REP. app. a at 13–15; 2002 ARRC ANN. REP. app. a at 12–13; 2001 ARRC ANN. REP. app. a at 12–14; 2000 ARRC ANN. REP. app. 1 at 8–10; 1999 ARRC ANN. REP. 2–3; 1998 ARRC ANN. REP. 2; 1997 ARRC ANN. REP. 2; 1996 ARRC ANN. REP. 2.

306. See *supra* note 305.

307. See *supra* note 305.

308. See IOWA CODE § 217.1 (2011).

309. See *supra* note 305.

310. See *supra* note 305.

311. See *supra* note 305.

312. See *supra* note 305.

Revenue & Fin. Dept.	250	7
Ed. Examiners Bd.	215	13
Ed. Dept.	190	16
Pharmacy Ex. Bd.	186	16
Pub. Safety Dept.	181	76
Transportation Dept.	173	10
Ethics & Camp. Discl. Bd.	170	28
Insurance Div.	170	24
Util. Div.	133	11
Iowa Finance Auth.	130	41
Ag. & Land Stewardship Dept.	127	34
Labor Svcs. Div.	118	14
Inspections & Appeals Dept.	113	14
Dental Examiners Bd.	108	7

2. ARRC Actions

The ARRC has complete discretion over which rules it decides to review.³¹³ Every final rule is placed on the docket of the AARC and the appropriate standing committees of the general assembly,³¹⁴ but not all rules receive thorough consideration.³¹⁵ Typically the committee gives full scrutiny to rules that are controversial, for example, when a trade association, lobbyist, or even an individual who will be affected by the rule has contacted a committee member or another legislator and expressed concern.³¹⁶ The administrative rules coordinator may also bring controversial or problematic rules to the committee's attention.³¹⁷ If the

313. See IOWA CODE § 17A.8(6) ("The committee shall meet for the purpose of selectively reviewing rules, whether proposed or in effect.").

314. *Id.* §§ 17A.5(1), 17A.4(1)(a).

315. See *id.* § 17A.8(6) (noting that rules are reviewed on a selective basis).

316. See *id.* (demonstrating that an agency or interested persons may be invited to be heard and present evidence in consideration of a rule).

317. See *id.* § 7.17.

committee determines the rule merits serious examination, both the agency and affected parties will be invited to appear before the committee at a meeting to present their positions.³¹⁸

While the ARRC has the statutory authority to consider both proposed and previously adopted and enacted rules,³¹⁹ the committee very rarely reviews rules that are well-established.³²⁰ Typically, the only enacted rules the ARRC reviews are those passed in accordance with the emergency rulemaking procedure,³²¹ which become effective before the ARRC can review them.³²² Other than this difference in timing, our study does not indicate any significant differences in the frequency or manner in which the ARRC approaches emergency rules as opposed to regular rules.

After considering the rule, the ARRC can take five possible actions: a seventy day delay, a session delay, a general referral, an objection, or a request for regulatory analysis.³²³ One rulemaking action might be subjected to more than one action; some filings receive both a delay and an objection, or a delay coupled with a general referral, and in rare instances, all three actions are applied.³²⁴ Normally a rule is effective thirty-five days after filing,³²⁵ although the rule may be immediately effective if filed under emergency provisions or effective at a later date if specified in the rule.³²⁶ Delay authority gives the committee, or the general assembly as a whole, time to decide whether to take any action with respect to the rule, and time for the agency to meet with affected parties to determine whether to amend or withdraw the rule.³²⁷ Upon a two-thirds vote, the committee may delay the effective date of a rule seventy days beyond its normal effective date,³²⁸ or until the adjournment of the next regular session of the

318. *Id.* §§ 17A.12(1), 17A.8(6).

319. *Id.* § 17A.8(6).

320. *See supra* note 305. In 1996, the committee reviewed the state's fire safety standards in response to penalties imposed as a result of a chemical fire in Sioux City. The committee was concerned that volunteers who helped in the response could be open to the Occupational Safety and Health Administration (OSHA) penalties. 1999 ARRC ANN. REP. 5.

321. *See supra* note 305.

322. *See* IOWA CODE § 17A.5(2).

323. *Id.* §§ 17A.4(6)–(7), 17A.8(7)–(9), 17A.4A(1).

324. *See, e.g.*, 2008 ARRC ANN. REP. 2–3; 1999 ARRC ANN. REP. 4–5.

325. IOWA CODE § 17A.5(1).

326. *Id.* § 17A.5(2).

327. *See id.* §§ 17A.4(7), 17A.8(9), 17A.8(6).

328. *Id.* § 17A.4(7). This subsection is to be used “only if further time is

legislature.³²⁹

A general referral means that the committee is asking the general assembly to review the rulemaking to consider whether any further action is necessary.³³⁰ The rule is referred to the speaker of the house and the president of the senate, who in turn assign the issue to the appropriate standing committee.³³¹ There is no impact on the rule unless the legislature decides to take action using normal legislative procedures. A rule that has received a session delay should always have a referral to the legislature along with it,³³² but we do not refer to that referral as a “general” referral and it is not counted as a general referral in the ARRC statistics reported here.³³³

If the committee deems a rule to be “unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency,” it may file an objection.³³⁴ The objection is filed with the administrative code editor, who then prints the objection in the administrative bulletin and the administrative code.³³⁵ As noted above, this is the most powerful of the committee’s tools because it shifts the burden of proof to the agency in any action challenging the rule, and renders the agency liable for attorney’s fees in the event the rule is overturned.³³⁶ The objection may make the agency less likely to enforce the rule vigorously, knowing the opposing party holds an advantage in any judicial review of the rule’s enforcement.³³⁷

Finally, the committee can request that the agency conduct a regulatory analysis of the rule. The ARRC may make the request within

necessary to study and examine the rule.” *Id.*

329. *Id.* § 17A.8(9).

330. *See id.* § 17A.8(8).

331. *Id.* § 17A.8(7).

332. *See id.* § 17A.8(8)–(9).

333. It is counted instead as a “session delay.”

334. IOWA CODE § 17A.4(6)(a).

335. *Id.*

336. *Id.* § 17A.4(6).

337. For example, in 2006 the ARRC objected to a rule promulgated by the EPC giving the DNR the authority to deny a construction permit to a confined animal feeding operation if it determined that manure from the operation would cause water pollution or an adverse effect on the environment. 2006 ARRC ANN. REP. 5; IOWA ADMIN. CODE r. 567-65.5(3) (2011). It does not appear that the DNR has ever used this authority to deny a permit. We suspect that the chilling effect of the ARRC’s objection may be behind the agency’s reluctance to use this provision.

thirty-two days of the filing of a proposed rule, or within seventy days of the final rule if the rule was filed on an emergency basis.³³⁸ The regulatory analysis requires the agency to discuss who will be affected and benefited by the rule, what the impact will be, including the costs both to the agency and affected parties, some cost-benefit analysis, and whether there are any less costly or intrusive methods of achieving the same purpose.³³⁹ The agency must then extend the comment period until at least twenty days after publication of the regulatory analysis.³⁴⁰

TABLE 3

Year	Total Actions	Total Delays	Comm. Objection	General Referral	Regulatory Analysis
1996	26	7	1	14	4
1997	20	3	3	14	0
1998	23	10	2	10	1
1999	17	8	2	7	0
2000	16	8	1	6	1
2001	14	8	0	3	3
2002	11	6	1	4	0
2003	16	6	1	5	4
2004	11	7	0	2	2
2005	9	0	1	6	2
2006	12	1	1	8	2
2007	12	3	1	7	1
2008	15	10	1	2	2
2009	15	7	2	5	1
2010	16	7	2	5	2
Total	233	91	19	98	25

Table 3 summarizes the actions taken by the ARRC annually from 1996 to 2010.³⁴¹ Over this period, the ARRC took 233 total actions affecting

338. IOWA CODE § 17A.4A(1).

339. *Id.* § 17A.4A(2)(a).

340. *Id.* § 17A.4A(4).

341. 2010 ARRC ANN. REP. 3-4; 2009 ARRC ANN. REP. 2-3; 2008 ARRC

216 rulemaking filings, or about fifteen actions per year.³⁴² While in raw terms this is a significant number of rulemakings affected by the ARRC process, it represents only 3.3% of the 6485 total rulemaking filings over this period. However, as we later discuss, that statistic understates the extent of the ARRC's influence.

In this period, the ARRC most frequently used its power to delay and refer rules.³⁴³ Of the ninety-one delays, the ARRC imposed a seventy-day delay more often (sixty-five times) than a session delay (twenty-six times).³⁴⁴ The referral authority was used ninety-eight times, more frequently in its first three years than in later years.³⁴⁵ We will discuss below the outcomes after referral. The ARRC used its most powerful weapon—the objection—relatively infrequently.³⁴⁶ The nineteen total objections average 1.26 objections per year. The regulatory analysis option, which both delays the rule and garners more information, was used twenty-five times, an average of 1.6 times annually.³⁴⁷

The number of ARRC actions and the relatively low percentage of rules affected might seem to indicate a committee using its authority judiciously, presenting only a small intrusion on the administrative process. However, it will become apparent as we delve further into the data that the influence the ARRC wields does not end with formal actions. Many rules that saw no formal action were significantly affected by the ARRC's attention. To avoid delay, objection, or possible legislative action, agencies often withdrew or agreed to modify the rule. While the reports are full of

ANN. REP. 2-3; 2007 ARRC ANN. REP. 2-3; 2006 ARRC ANN. REP. 2-3; 2005 ARRC ANN. REP. 2-3; 2004 ARRC ANN. REP. 2-3; 2003 ARRC ANN. REP. 2-3; 2002 ARRC ANN. REP. 2-3; 2001 ARRC ANN. REP. 2-3; 2000 ARRC ANN. REP. 2-3; 1999 ARRC ANN. REP. 4-5; 1998 ARRC ANN. REP. 2-4; 1997 ARRC ANN. REP. 2-4; 1996 ARRC ANN. REP. 3.

342. Eighteen actions were taken on rules that had already been subject to another ARRC action. *See* 2009 ARRC ANN. REP. 3; 2008 ARRC ANN. REP. 2-3; 2002 ARRC ANN. REP. 2-3; 2001 ARRC ANN. REP. 2-3; 1999 ARRC ANN. REP. 4-5; 1998 ARRC ANN. REP. 3-4; 1997 ARRC ANN. REP. 3-4.

343. *See supra* Table 3.

344. *See supra* Table 3. The committee may use more than one of these tools on the same rule. For example, it may issue a seventy-day delay first, followed by a session delay if no action has been taken by the end of the seventy-day delay. *See, e.g.,* 2008 ARRC ANN. REP. 2.

345. *See supra* Table 3.

346. *See supra* Table 3.

347. *See supra* Table 3.

instances of this nature, we were not able to count accurately the number of rules affected by the threat of ARRC action.

Historic data reveals that the ARRC has significantly changed its approach from the early period of its existence. The record from the early period shows a remarkable degree of the ARRC activism. In its first nineteen years (1977–1995) the committee imposed a total of 142 objections and fifty delays.³⁴⁸ Thus, the committee was using the objection power on average seven times per year, whereas in the last fifteen years the ARRC has used the objection power slightly more than once per year on average. By contrast, the committee has begun to use the delay power more frequently, from an average of 2.6 delays per year in the early period³⁴⁹ to nearly six delays annually in the later period.³⁵⁰ This seems to comport with the tenor of the more recent committee reports, which encourage the agencies to work with affected parties; the ARRC often uses the delay power to give the parties time to reach a compromise.³⁵¹ The ARRC Counsel, Joe Royce, suggests that perhaps both the committee and the agencies learned from early experience that the objection should be reserved for instances when compromise was not possible.³⁵² Again, this illustrates that the number of objections significantly understates the degree of the ARRC's influence on the rulemaking process.

We expected to find that the ARRC would be more active during periods of split political control; for example, when at least one chamber of the general assembly is controlled by a different political party than the party to which the governor belongs. Even though the committee is bipartisan, three members come from the majority and two members come from the minority party in each house, thus giving the majority a 6–4 edge when a particular party controls both houses.³⁵³ The two-year period of lightest ARRC review (2005–2006) occurred after the Democrats achieved a split in control of the senate, perhaps dampening the ARRC's enthusiasm

348. See 1996 ARRC ANN. REP. 3. The data mentions 143 objections between 1977 and 1995, but that figure includes one objection made in 1996. *See id.*

349. *See id.*

350. *See supra* Table 3.

351. *See, e.g.*, 2008 ARRC ANN. REP. 4, 7 (imposing delay and requesting the Public Safety Department work with the gaming industry to resolve issues and redraft rules).

352. *See* E-mail from Joe Royce, Iowa State Legislature to author (Aug. 8, 2012) (on file with author).

353. *See* IOWA CODE § 17A.8(1) (2011).

for review of the Democratic executive branch. However, overall the trends in ARRC activity did not seem to be tied directly to partisan political control.³⁵⁴ Statistics show the ARRC acted just as often against Democratic Governor Culver when the legislature was controlled by the Democrats (2007–2010) as the Republican legislature did against Democratic Governor Vilsack (1999–2004).³⁵⁵ In fact, the total number of ARRC actions was highest in 1997 and 1998, when both the executive and legislative branches were controlled by Republicans.³⁵⁶ Thus, the tug of war between the legislative and executive branches may be a more powerful driver than the partisan political differences.

TABLE 4

Years	Senate Control	House Control	Governor	ARRC Actions
1997-1998	Republican	Republican	Branstad	43
1999-2000	Republican	Republican	Vilsack	33
2001-2002	Republican	Republican	Vilsack	25
2003-2004	Republican	Republican	Vilsack	27
2005-2006	Split 25-25	Republican	Vilsack	21
2007-2008	Democrat	Democrat	Culver	27
2009-2010	Democrat	Democrat	Culver	31

3. Agencies Targeted by ARRC Actions

The ARRC rarely seems to affect most agencies. The majority of ARRC actions taken over the course of our study focused on a small handful of agencies.

354. See *infra* Table 4.

355. See *infra* Table 4.

356. See *infra* Table 4.

TABLE 5³⁵⁷

Agency	Delay	Objection	Referral	Reg. Analysis	TOTAL	Filings	% acted on
Environmental ³⁵⁸	19	7	10	12	48	609	8%
Human Serv.	10	2	17	0	29	1073	3%
Licensure ³⁵⁹	16	1	8	1	26	896	3%
Education	4	0	8	1	13	190	7%
Rev./Finance	3	1	8	0	12	250	5%
Public Safety	6	0	4	1	11	181	6%
Transportation	2	0	6	0	8	173	5%
Public Health	4	1	2	0	7	322	2%
Racing/Gaming	4	0	3	0	7	61	11%
Inspect./Appeals	1	1	5	0	7	113	6%

As shown in Table 5, the ARRC's focus has been selective. The ten agencies listed above received 168 ARRC actions, or 72% of the committee's actions. The agencies with environmental responsibilities received the most scrutiny and action. The two rulemaking components of the DNR, including the EPC and the NRC, were subjected to forty-eight total ARRC actions, which is over 20% of all ARRC actions. While comprising only 4.2% of total rulemaking filings,³⁶⁰ the EPC has been the recipient of 37% (seven of nineteen) of the objections issued by the ARRC, which is its most powerful tool.³⁶¹ The environmental agencies have also received the lion's share of requests for regulatory analysis (twelve), which is nearly one-half of all such requests.³⁶² No other agency received more than two requests.³⁶³ As we will discuss later, many other environmental rules have been withdrawn or modified due to the threat of ARRC action.

The environmental agencies are also second in terms of the

357. See *supra* note 341.

358. Includes EPC, NRC, Underground Storage Tank Fund Board, and the DNR.

359. Includes Boards of Examiners for Teachers, Chiropractors, Physical Therapists, Dentists, Physicians, and Nurses.

360. See *supra* Table 2; 2010 ARRC ANN. REP. 2; 2000 ARRC ANN. REP. 1. Note that the EPC is a subset of the category of "environmental" in Table 5.

361. See *supra* note 341.

362. See *supra* note 341.

363. See *supra* note 341.

percentage of their rulemakings subject to action.³⁶⁴ The highest in terms of percentage is the Racing and Gaming Commission, which makes a relatively small number of rules.³⁶⁵ Some of those rules, such as rules regarding slot machines and cash advances, were controversial.³⁶⁶ Human Services accounted for the second highest total ARRC actions, which is not surprising because that agency has the highest volume of rulemaking.³⁶⁷ Licensure issues in various professional contexts seemed to attract a lot of attention from the committee. For example, in 2001, the committee delayed and referred rules regarding the effect of a child abuse conviction on licensure for educators.³⁶⁸

Thus, the ARRC's review activity is not evenhanded. The committee does not engage in a systematic, comprehensive review of agency regulations. Rather, it tends to focus on a few agencies with mandates that often raise the ire of regulated entities. One could argue, of course, that this is because those particular agencies most often stray beyond legislative intent or engage in unreasonable rulemaking. More likely, however, is the fact that those agencies deal with politically controversial areas.

4. *Agency Responses to ARRC Actions*

We used ARRC reports, meeting minutes, Iowa House and Senate Journals, and Iowa Administrative Bulletins to determine what happened to a rule once the ARRC decided to review it. The annual ARRC reports contain summaries not only of ARRC actions, but also of rulemakings that the committee discussed and resolved without taking formal action.³⁶⁹ When an agency found itself subject to ARRC scrutiny, it often reacted quite quickly.³⁷⁰ Fearing the repercussion of an objection or delay, these agencies sought out the complaining party to reach an agreement on the issue.³⁷¹ Sometimes the ARRC encouraged and facilitated such dealing.³⁷²

364. *See supra* Table 5.

365. *See supra* Table 5.

366. 1999 ARRC ANN. REP. 9–10.

367. *See supra* Table 5.

368. 2001 ARRC ANN. REP. 5.

369. *See, e.g.*, 2008 ARRC ANN. REP. 7–10.

370. *See, e.g., id.* at 4 (discussing Committee-imposed delay of a rule that resulted in the rule being rescinded).

371. *See id.* (showing a successful compromise between an agency and affected parties). *But see id.* at 7 (highlighting a failed compromise attempt after Committee scrutiny).

For example, the 2008 annual report noted that the ARRC delayed a rule regulating underground storage tank monitoring after the regulated entities complained about the cost: “Committee members imposed a session delay on this filing with the request that the [EPC] and concerned stakeholders work to resolve these issues. The delayed rules were rescinded and compromises were implemented in March 2009.”³⁷³ Similar committee requests, coupled with delays, can be found throughout the reports.³⁷⁴

A 1999 incident shows that even the ARRC itself recognizes the influence it wields. The committee informed the Iowa Housing Finance Authority that it was informally objecting to a filing.³⁷⁵ The committee report noted: “The action was in a sense a warning of what the committee might do if the rules were not revised.”³⁷⁶

Even when the ARRC did not delay a rule, the simple act of placing a rule on the docket seemed to get the attention of agencies. Frequently, an agency’s response to the ARRC’s consideration was to either withdraw the rule entirely or agree to a modification to satisfy the rule’s opponents. The annual reports describe numerous instances over the fifteen year period in which rules were either withdrawn or modified in this manner.³⁷⁷ Thus, the number of formal actions taken by the ARRC significantly understates the committee’s effect on agency rulemaking.

This check on agency rulemaking might be seen as desirable—an indication that the ARRC process is working quickly to weed out rules that were improvidently promulgated. In some instances, the rulemaking appeared to be improved in that it accomplished its purpose more

372. *See id.* at 7.

373. *Id.*

374. *See, e.g., id.* at 7; 2009 ARRC ANN. REP. 6–7; 2001 ARRC ANN. REP. 9.

375. 1999 ARRC ANN. REP. 8.

376. *Id.*

377. *See, e.g.,* 2008 ARRC ANN. REP. 7 (noting that the ARRC requested the Department of Transportation resolve complaints regarding a proposed rule involving close-clearance warning signs; ultimately, the rule was not adopted); 2006 ARRC ANN. REP. 6 (explaining that the committee extensively reviewed Medicaid plan changes and “determined the rulemaking should proceed” after obtaining concessions from the agency); 2003 ARRC ANN. REP. 9–10 (observing that after ARRC review a rule regarding dispensing of prescriptions in long-term care facilities was terminated “[i]n response to public and Committee concerns”).

efficiently or effectively.³⁷⁸ Indeed, Iowa is fortunate that Joe Royce's thoughtful counsel has guided the committee's review process during the entire period of its existence. From the agency's perspective, however, these statistics might prove the *in terrorem* effect of the process—an opponent's ability to use political leverage to kill or modify rules that have come through a more balanced and well-informed agency process. In effect, the data tells the story of the ARRC as the proverbial "gorilla in the closet." Moreover, the modification of the rules takes place in a negotiated framework that excludes public participation and operates behind the scenes, as Auerbach feared.³⁷⁹

The objection may make the agency less likely to enforce the rule vigorously, knowing the opposing party holds an advantage in any judicial review of the enforcement proceeding.³⁸⁰ For example, in 2006 the ARRC objected to a rule promulgated by the EPC, which gave the DNR the authority to deny a construction permit to a confined animal feeding operation if it determined that manure from the operation would cause water pollution or an adverse effect on the environment.³⁸¹ In the wake of that objection, the DNR has never used this authority to deny a permit.³⁸² The chilling effect of the ARRC's objection may be behind the agency's reluctance to use this provision.

Regardless of one's perspective, the data proves that the small number of rules actually objected to or delayed by the ARRC represent only a small portion of the rules affected by the threat of the ARRC's power. The reports indicate that agencies frequently modify or withdraw rules even before the ARRC acts. Certainly, this ARRC mechanism represents a significant intrusion by the legislative branch into the administration of the law by the executive.

378. See, e.g., 2005 ARRC ANN. REP. 6 (noting that the NRC terminated rulemaking regarding leasing fees for commercial docks after agreeing that concerns raised in ARRC proceeding were well-founded).

379. See Auerbach, *supra* note 230, at 570.

380. See IOWA CODE § 17A.4(6) (2011).

381. IOWA ADMIN. CODE r. 567-65.5(3) (2011); see 2006 ARRC ANN. REP. 5.

382. The DNR states that it has used this "Department Evaluation" rule informally in discussions with applicants, but it has never used the rule to deny a construction permit for an animal feeding operation. See E-mail from Ed Tormey, Counsel, Iowa Dep't of Natural Res., to author (Aug. 23, 2012) (on file with author).

5. *Legislative Response to ARRC Actions*

Filings that receive a general referral run into the typical roadblocks facing any proposed legislative action. The rules are referred to the president of the senate and the speaker of the house in order to be delegated to the proper legislative committees.³⁸³ The committee to which the rule is referred may already be burdened with a significant workload, and may place a relatively low priority on the rule review. In other cases, upon further consideration, the rule may raise difficult practical and political issues the committee is reluctant to tackle. Moreover, the assembly's self-imposed "funnel week" requires some minimal progress of legislation by a point early in the session if it is to survive for further consideration.³⁸⁴ Even if legislation to rescind or alter the rule makes it out of committee, the possibility increases that members in the larger legislative body with opposing views will block legislative action based on policy or expertise in the subject area.

Therefore, it is not surprising that the general assembly does not often reverse an agency rule referred to it by the ARRC. Still, the legislature ends up taking some sort of action on about one-third of the referrals: 27.8% of referred rules were revised by the assembly, while another 5.6% were outright rescinded by the assembly.³⁸⁵ Again, this percentage understates the influence of a referral, because the agency either revised or withdrew another 17% of the rules after referral.³⁸⁶ Thus, only one-half of the rules the ARRC referred to the general assembly ended up in the Iowa Administrative Code in their original form.

6. *Summary of the ARRC's Effect on Agency Rulemaking*

Despite Bonfield's hope that the ARRC's review power would be used only to flag rules that are arbitrary or exceed the agency's statutory authority,³⁸⁷ the evidence suggests that the ARRC often acts based on policy disagreement. For example, in 1996 the committee objected to the EPC's failure to adopt a rule amending manure-management

383. IOWA CODE § 17A.8(7).

384. See Iowa Legislature "Funnel Week," SIOUXLAND CHAMBER OF COMM. BLOG (Feb. 20, 2012), <http://siouxlandchamberblog.com/2012/02/20/iowa-legislature-funnel-week/>.

385. See *supra* note 305.

386. See *supra* note 305.

387. See Bonfield, *supra* note 65, at 819.

requirements.³⁸⁸ The objection was not based on the idea that the agency acted beyond its statutory authority, but it was based on what the committee called the “inherent unfairness” of the rule.³⁸⁹ In 2010, the committee reviewed a DNR rule imposing a fee for certain special events. Again, the discussion had nothing to do with the department’s authority; instead, it seemed to center solely on whether the fee was a good idea.³⁹⁰

Some may view the “reasonableness” standard as a salutary check on agency overreaching, but this type of review does not support the notion that the legislature is the best judge of the scope of the agency’s delegated authority. From a policy standpoint, one may question whether the ARRC is in the best position to judge the reasonableness of a rule—the committee reaches a conclusion after a relatively brief review and a small number of witnesses, while the agency usually spends months or years developing the rule, considering public comments, and exercising its own expertise, including a broader perspective of where the rule fits into the larger regulatory framework. There is little doubt that the ARRC reports show that the committee’s exercise of its power furthers a political, rather than a professional, model of the rulemaking process.

Although the ARRC takes action on a relatively small number of rules,³⁹¹ the data shows its actual influence on the administrative process is considerable.³⁹² Even the threat of ARRC review may cause an agency to withdraw or amend a rule it realizes will face adverse committee action. This could be a useful and efficient check on agency overreaching. For example, Bonfield relates an episode in which Joseph Royce, counsel to the ARRC, prepared an opinion concluding an agency had exceeded its statutory authority with a rule involving bilingual teaching requirements. Rather than go through the ARRC review, the agency head agreed to amend the rule in accordance with the opinion.³⁹³ An ARRC supporter would say the system worked in that case to weed out a rule of questionable validity. On the other hand, the anecdote illustrates that a small group of legislators is able to trump the administrative process, and rather than amending the law or challenging the rule in court, legislators

388. 1996 ARRC ANN. REP. 3–4.

389. *Id.* at 4.

390. See 2010 ARRC ANN. REP. 6; see also *id.* at 4–5 (objecting to EPC leak-detection requirements for fueling facilities because they are “unreasonable”).

391. See *supra* notes 289 & 342 and accompanying text.

392. See *supra* Part III.B.2–4.

393. BONFIELD, *supra* note 40, § 8.3.1.

can use their powers to pressure the agency to back down. If the agency, on careful consideration, decides the rule is beyond its authority, that may be acceptable; but if the power is used to force agency compromise on issues of policy it has been delegated to decide, the process seems less benign.

Our data shows that the ARRC's review power is focused on a few agencies, which have the most politically controversial mandates.³⁹⁴ Again, one could view the selective nature of the ARRC's review in a positive light. Bonfield himself recognized that the committee's power would be exercised selectively:

In fact, public displeasure is likely to be the most fertile source for Committee selection of those rules to be reviewed. This is as it should be if the review process is meant to assure further protection of the public against agency overreaching. Further, to be realistic, it must be recognized that agencies that are trusted by the legislature are likely to have fewer of their rules reviewed than agencies that are distrusted by the legislature.³⁹⁵

Certainly, Bonfield's prediction has proved valid with regard to the committee's selection of rules to review. His vision unabashedly injects political considerations into the agency's rulemaking process. As noted above, the notion that elected officials should make or at least supervise policy decisions has some appeal, and the legislature has oversight and statutory amendment tools at its disposal to express those political preferences. The next section discusses whether it is constitutional to permit distrust by a small group of legislators or the committee's perception of public displeasure to affect the executive branch's duty to execute the law faithfully.

IV. CONSTITUTIONALITY OF ARRC AUTHORITY

A. Federal Background

Although federal separation of powers authority does not control a state court's analysis of state constitutional law, the U.S. Supreme Court's jurisprudence on these issues may prove to be persuasive.³⁹⁶ In this section,

394. See *supra* Part III.B.3.

395. Bonfield, *supra* note 65, at 902.

396. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 134 (3d ed. 2000) (noting that the "norms and principles emanating from or embodied in [federal separation of powers] rules" may have some application to states).

we sketch some of the most important landmarks, which help define the limits of legislative branch control over administrative rulemaking. Although our discussion is not intended to be a treatise on federal separation of powers, it should be sufficient to show that the U.S. Supreme Court, has rejected the “political” theory of rulemaking that would support the ARRC’s powers.

In general, the Supreme Court strictly polices the dividing lines between the three branches of government. The Court has frequently noted that “the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”³⁹⁷ On the other hand, the Court recognizes that some degree of coordination among the branches is necessary and desirable for the government to properly function:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.³⁹⁸

Therefore, in some situations, the Court has used a more “functional” approach to separation of powers. As the Court stated in *Buckley v. Valeo*, the framers knew that “a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.”³⁹⁹ Thus, the Court has approved of legislative schemes, such as the Independent Counsel Act, which limit the authority of the Executive Branch and involve some blurring of the constitutional lines between the branches.⁴⁰⁰ In *Humphrey’s Executor v. United States*, the Court approved of the concept of independent agencies by allowing limitations on the President’s removal of agency officials.⁴⁰¹ In *Mistretta v. United States*, the Court allowed judges to serve on the Sentencing Commission, which produces sentencing guidelines

397. *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)) (internal quotation marks omitted).

398. *Id.* at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

399. *Buckley*, 424 U.S. at 121.

400. *See Morrison*, 487 U.S. at 696–97 (approving a congressional limitation on the President’s ability to appoint and remove independent counsel).

401. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630–32 (1935).

and seems to be either a legislative or executive function.⁴⁰²

Nevertheless, the Court has viewed Congress's attempts to aggrandize its own powers at the expense of the other branches with more skepticism.⁴⁰³ An early decision raising aggrandizement concerns was *Springer v. Philippine Islands*, in which the Court held that the legislature of the Philippine Islands could not appoint officials to agencies with executive functions.⁴⁰⁴ The Court held that "this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism."⁴⁰⁵ Likewise, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."⁴⁰⁶ Thus, by "[n]ot having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection."⁴⁰⁷ *Springer* suggests that if the ARRC is performing executive functions, then it must be made up of executive officers appointed in the constitutional manner by the Executive.⁴⁰⁸ In fact, a 1953 Harvard Law Review article concluded that *Springer* rendered invalid congressional attempts to vest in legislative committees the power to disapprove executive actions.⁴⁰⁹

In *Buckley*, the Court further clarified which powers were executive in nature and noted that these powers could not be delegated to committees composed of legislative members.⁴¹⁰ In *Buckley*, the Court invalidated a provision of the Federal Election Campaign Act which provided for some members of the Federal Election Commission (FEC) to

402. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

403. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986) (rejecting congressional supervision over executive branch officials); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting attempts by the branches to expand their power beyond the outer limits must be rejected despite the wisdom of the policy).

404. See *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928).

405. *Id.* at 201–02.

406. *Id.*

407. *Id.*

408. See *id.*

409. See Ginnane, *supra* note 9, at 605–09 (calling the constitutional arguments against such schemes "overwhelming").

410. *Buckley v. Valeo*, 424 U.S. 1, 121–24 (1976) (per curiam).

be appointed by the Speaker of the House and President pro tempore of the Senate.⁴¹¹ The Court determined this was an unconstitutional usurpation of the executive function: “the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”⁴¹²

The Court noted that Congress could appoint officers only to carry out legislative, rather than executive, functions.⁴¹³ It then carefully examined the legislative committee’s powers in order to separate possible legislative functions from those that should be considered executive.⁴¹⁴ The Court determined the FEC’s powers that were “investigative or informative [in] nature” could validly be performed by commissioners appointed by Congress.⁴¹⁵ However, the FEC’s enforcement power, involving discretionary authority to seek judicial relief, was executive in nature because it involved a remedy for breach of the law.⁴¹⁶ Legislative officers may only perform duties “in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed” by nonexecutive officers.⁴¹⁷ The Court went on to hold that other functions of the commission, including rulemaking, advisory opinions, and determination of eligibility for funds and elective office, were “administrative” in nature and could thus be performed only by Executive officers.⁴¹⁸ Thus, the functions of the ARRC that go beyond supporting the work of the legislature would be deemed impermissible under the *Buckley* approach. When the ARRC exercises discretionary authority over rulemaking in a way that affects judicial review, it is crossing the constitutional boundary of legislative power.

In *Chadha*, the Court made it clear that the Legislature could not intrude into the Executive’s power to carry out the law unless it followed the constitutional requirements for making a new law.⁴¹⁹ The case

411. See *id.* at 143–44.

412. *Id.* at 129 (footnote omitted).

413. *Id.* at 128.

414. *Id.* at 137–41.

415. *Id.* at 137–38.

416. *Id.* at 138.

417. *Id.* at 139.

418. *Id.* at 140–41.

419. *INS v. Chadha*, 462 U.S. 919, 954–55 (1983).

concerned a statute that gave each house of Congress the authority to veto the Attorney General's decision to suspend the deportation of an undocumented immigrant.⁴²⁰ The Court held that overturning the Attorney General's decision was a legislative action, which must follow the requirements of bicameral vote and presentation to the President in order to be valid.⁴²¹ To determine whether a particular action should be considered legislative in character, the Court focused on whether the action "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch."⁴²² Obviously, the action in that case altered Chadha's ability to remain in the country, so it had an external effect.⁴²³ Although Congress can delegate power to an administrative agency, when the agency carries out its authority it is subject only to judicial review and "the power of Congress to modify or revoke the authority entirely."⁴²⁴ The decision to deport Chadha involved "determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."⁴²⁵

In dissent, Justice White argued that "the history of the separation-of-powers-doctrine is also a history of accommodation and practicality."⁴²⁶ He argued for approval of the legislative veto, because "we must have a workable efficient Government."⁴²⁷ The majority, in contrast, refused to allow any fudging of the constitutional boundaries for pragmatic reasons; "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the

420. *See id.* at 923–28.

421. *Id.* at 954–55.

422. *Id.* at 952.

423. *See id.*

424. *Id.* at 953–54 n.16.

425. *Id.* at 954–55.

426. *Id.* at 999 (White, J., dissenting).

427. *Id.* at 1000. To some degree, the post-*Chadha* mechanisms Congress has used to regain control over agency action bear out Justice White's critique. In many cases, Congress simply places a rider into the agency's appropriations bill, prohibiting the use of any funds to carry out the regulation or other action. In other cases, Congress may use informal, nonstatutory arrangements with agencies that may be less transparent than the legislative veto. *See* LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 121–23 (3d ed. 2001).

primary objectives—or the hallmarks—of democratic government.”⁴²⁸

Thus, the application of *Chadha* to the provisions of the ARRC procedure seems clear. The ARRC decision to delay or object to a regulation does have consequences for persons outside the legislative branch.⁴²⁹ An objection changes how a court will deal with a particular case, so it alters the obligations of the judicial branch.⁴³⁰ A delay deprives those who would be benefitted by the rule of its application, at least temporarily.⁴³¹ Because delay and objection constitute legislative acts, the legislature can only accomplish such acts by enacting legislation to that effect following separation of powers rules.⁴³²

Similarly, in *Metropolitan Washington Airports Authority*, the Court rejected the plea that some creative arrangements were necessary to create a “workable government.”⁴³³ Regardless of its pragmatic virtues, the Court disapproved of any scheme that would allow Congress’s arrogation of duties that belong to the Executive Branch.⁴³⁴ In that case, Congress created a new board of review, which would have authority over decisions made concerning the Washington National Airport and Dulles International Airport.⁴³⁵ The new board was to be composed of nine members of Congress, selected from those who served on transportation-related committees.⁴³⁶ The Court stated very simply the separation of powers principles involved:

To forestall the danger of encroachment “beyond the legislative sphere,” the Constitution imposes two basic and related constraints on the Congress. It may not “invest itself or its Members with either executive power or judicial power.” And, when it exercises its legislative power, it must follow the “single, finely wrought and exhaustively considered, procedures” specified in Article I [of the

428. *Chadha*, 462 U.S. at 944.

429. *See, e.g.*, 2006 ARRC ANN. REP. 5.

430. *See id.*; IOWA CODE § 17A.4(6) (2011).

431. *See, e.g.*, 2008 ARRC ANN. REP. 4.

432. *See Chadha*, 462 U.S. at 954–55.

433. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276–77 (1991).

434. *Id.*

435. *Id.* at 258–61.

436. *Id.*

Constitution].⁴³⁷

The Court did not determine whether such a review board could exercise legislative or executive authority since it was impermissible in either case:

If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, §7. In short, when Congress “[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch,” it must take that action by the procedures authorized in the Constitution.⁴³⁸

The reasoning of *Metropolitan Washington Airports Authority* makes clear that while the legislature may certainly enact a statute setting forth the burden of proof standard to be applied by courts, it may not delegate to a committee its power to decide the burden of proof for individual cases.⁴³⁹ The Court defended its strict view on the separation of powers by noting that “[e]ach branch, in its own way, is the people’s agent, its fiduciary for certain purposes Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master’s other agents.”⁴⁴⁰ The Court also quoted James Madison:

The legislative department . . . can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.⁴⁴¹

Similarly, in *Bowsher v. Synar*, the Court was vigilant in policing the line between Legislative and Executive Branch authority.⁴⁴² The Court invalidated provisions of the Balanced Budget and Emergency Deficit Control Act that vested executive power in the comptroller general, an

437. *Id.* at 274 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *Chadha*, 462 U.S. at 951).

438. *Id.* at 276 (quoting *Chadha*, 462 U.S. at 952–55) (footnote omitted).

439. *See id.* at 272–74.

440. *Id.* at 272 (quoting Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 385–86 (1976)) (internal quotation marks omitted).

441. *Id.* at 273–74 (quoting THE FEDERALIST NO. 48, at 310 (James Madison) (J. Cooke ed., 1961)).

442. *Bowsher v. Synar*, 478 U.S. 714 (1986).

official appointed by the President but removable only by Congress.⁴⁴³ The Court quoted Montesquieu's dictum, echoed by James Madison in the Federalist No. 47: "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."⁴⁴⁴ Although the issue concerned only the removal power, the Court stated broadly that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."⁴⁴⁵ The Court emphasized that keeping each department "free from the control or coercive influence, direct or indirect, of either of the others" was a "fundamental necessity."⁴⁴⁶ The Court found the activities of the comptroller general were executive in nature:

Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under [the statute], the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.⁴⁴⁷

Using that definition as a test, ARRC members must interpret a law to determine whether a rule is within the law's intent and exercise judgment in deciding whether the rule is arbitrary or unreasonable.⁴⁴⁸ The members do, in fact, exactly what the executive is supposed to do in carrying out the law.

In his treatise on state administrative rulemaking, Professor Bonfield argued in favor of a political model of agency rulemaking, which included legislative review to ensure that regulations more accurately reflect legislative intent.⁴⁴⁹ He believed there was a "practical necessity for the legislature to create some effective legislative mechanism to review agency

443. *Id.* at 733–34.

444. *Id.* at 721–22 (quoting THE FEDERALIST NO. 47, at 325 (James Madison) (J. Cooke ed., 1961)) (internal quotation marks omitted).

445. *Id.* at 722.

446. *Id.* at 725 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629–30 (1935)) (internal quotation marks omitted).

447. *Id.* at 733.

448. See IOWA CODE §§ 17A.8(8), 17A.4(6) (2011).

449. BONFIELD, *supra* note 40, § 1.12 (describing the author's "clear bias" in favor of the political model, which he finds "more functional and wise in the long run" than a technocratic process).

rules.”⁴⁵⁰ The U.S. Supreme Court, however, has consistently rejected this pragmatic argument in cases such as *Chadha* and *Metropolitan Washington Airports Authority*.⁴⁵¹

Taken together, these cases illustrate that the Court seems to view any actions that have an effect on the rights and responsibilities of persons as legislative acts.⁴⁵² This legislative function may be carried out in only two ways: (1) Congress may act by following the bicameralism and presentment requirements of lawmaking; or (2) it may delegate the authority to an agency outside the Legislative Branch as long as it gives the agency adequate guidance.⁴⁵³ If it chooses the latter course, Congress must not interfere in the agency’s exercise of that delegated function, except by using its full lawmaking powers.⁴⁵⁴ Congress may delegate responsibility to a legislative agency, or a subset of legislators, only where the actions relate to assisting Congress in its responsibilities, such as investigation or information gathering.⁴⁵⁵ Of course, the legislative committee can attempt to influence the agency by exercising its oversight powers, questioning agency officials, and threatening to take legislative action in the form of budgetary or statutory changes.⁴⁵⁶ However, the committee, acting alone, may not engage in any functions that affect the rights and responsibilities of citizens.⁴⁵⁷

B. Iowa Separation of Powers Authority

While the language of the Iowa constitution is not identical to the federal version, the separation of powers principles are clearly meant to be very similar. Article III, section 1 sets out the three “departments” of government and explicitly prohibits aggrandizement by any of the three branches:

450. *Id.* § 8.3.3.

451. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276–77 (1991); *INS v. Chadha*, 462 U.S. 919, 944 (1983).

452. *See Metro. Wash. Airports Auth.*, 501 U.S. at 258 n.4; *Chadha*, 462 U.S. at 952–55.

453. *See Metro. Wash. Airports Auth.*, 501 U.S. at 274–76; *Chadha*, 462 U.S. at 951, 954–55.

454. *See Metro. Wash. Airports Auth.*, 501 U.S. at 258; *Chadha*, 462 U.S. at 954–55.

455. *See Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976).

456. *See Chadha*, 462 U.S. at 955 n.19.

457. *See Metro. Wash. Airports Auth.*, 501 U.S. at 276.

The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.⁴⁵⁸

The three departments' exact duties are not defined. However, the legislative branch, in exercising its duty of lawmaking, must adhere to the same bicameralism and presentment requirements the U.S. Supreme Court emphasized in *Chadha*.⁴⁵⁹ Section 17 of Article III sets out the bicameralism principle, requiring all bills to be passed "by the assent of a majority of all the members elected to each branch of the general assembly."⁴⁶⁰ Section 16 of Article III requires presentment, mandating that every bill be presented to the governor and obtain approval or be overridden by the legislature.⁴⁶¹

The Iowa constitution contains an unusual provision, which specifically authorizes the legislature to "nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly."⁴⁶² This provision, added to the Iowa constitution in 1984, avoids the presentment requirement for legislative vetoes of agency rules by concurrent resolution.⁴⁶³ However, this provision still requires bicameralism and thus does not authorize a joint committee of the general assembly to take action affecting agency rulemaking.⁴⁶⁴

There are no cases challenging Iowa's ARRC procedure, although the objection power has been a factor in several reported decisions. In 1978, the Iowa Supreme Court held that the committee's objection must be reasonably specific, in order to convey to the agency its "nature and scope."⁴⁶⁵ Because the committee's objection met the minimum requirements, however, the court upheld the trial court's decision to shift

458. IOWA CONST. art. III, div. 1, § 1.

459. *Chadha*, 462 U.S. at 948–51.

460. IOWA CONST. art. III, § 17.

461. *Id.* § 16.

462. *Id.* § 40.

463. *See id.* §§ 40, 16.

464. *See id.* § 40.

465. *Schmitt v. Iowa Dep't of Soc. Servs.*, 263 N.W.2d 739, 743–44 (Iowa 1978) (quoting *Bonfield*, *supra* note 65, at 908–12).

the burden of proof to the agency.⁴⁶⁶ Similarly, in 1983, the court held that the burden would shift only with respect to the precise grounds noted in the objection; when the rule is challenged on other grounds, the burden should remain on the challenger.⁴⁶⁷ In that case, the ARRC had objected on the ground that the rule was unreasonable, while the trial court's decision was based on whether the rule was within the agency's statutory authority.⁴⁶⁸

In 1981, the Iowa Supreme Court applied the burden-shifting provision without discussing the constitutional validity of the statute.⁴⁶⁹ Petitioners in that case challenged a Department of Revenue rule regarding sales tax on automobile repair services.⁴⁷⁰ Although the court noted that the burden shifted to the agency, it upheld the rule as reasonable and within the department's authority.⁴⁷¹ Beyond noting that the committee had objected, the court did not refer to the reasons for the committee's objection.⁴⁷²

In 1988, the Iowa Supreme Court held that the Iowa Department of Transportation did not have sufficient authority for a rule establishing the margin of error for an alcohol breath test.⁴⁷³ The court refused to imply the authority for the rule into the department's general rulemaking authority, "especially in view of the burden imposed on the agency because of the objection of the administrative rules review committee."⁴⁷⁴ Thus, the committee's objection appeared to have a significant impact on judicial review of the agency's rule. Again, the court did not discuss the constitutionality of the statute.

The Iowa Supreme Court has interpreted the Iowa constitution to require that each "branch of government not impair another in the performance of its *constitutional* duties."⁴⁷⁵ The court also recognizes that

466. *Id.* at 743–44.

467. *See* Iowa–Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748, 752 (Iowa 1983).

468. *Id.*

469. *See* Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue, 301 N.W.2d 760, 764–66 (Iowa 1981).

470. *Id.* at 762.

471. *Id.* at 766.

472. *See id.* at 764–66.

473. Barker v. Iowa Dep't of Transp., 431 N.W.2d 348, 349–50 (Iowa 1988).

474. *See id.*

475. Klouda v. Sixth Judicial Dist. Dep't of Corr. Servs., 642 N.W.2d 255, 260

separation of powers “has no rigid boundaries”⁴⁷⁶ and that “some functions inevitably intersect.”⁴⁷⁷ The court cited a treatise indicating there is “sometimes an overlapping or blending of powers of separate departments.”⁴⁷⁸ Nevertheless, the court has vigilantly defended its right to sentence criminals and to grant probation, which it deems essentially judicial functions.⁴⁷⁹ In general, the Iowa Supreme Court has held that “the legislature cannot mandate to the judiciary how it should interpret a particular statute. Interpretation is a judicial, not a legislative function.”⁴⁸⁰

Several Iowa decisions involving criminal sentencing illustrate the dividing line between judicial and legislative functions. For example, the Iowa Supreme Court upheld an Iowa Department of Corrections screening policy that determined which offenders would be considered for early release because it established a general procedure rather than determining the length of an individual inmate’s sentence.⁴⁸¹ Similarly, the legislature could establish general parole and work-release eligibility requirements for inmates.⁴⁸² In contrast, the court disapproved of a statute that transferred probation revocation cases to administrative law judges employed by the Iowa Board of Parole because applying sentencing provisions in individual cases is a judicial power.⁴⁸³

Therefore, while the legislature establishes the law, including the general judicial procedural standards, the application of those standards to particular cases rests with the judiciary.⁴⁸⁴ The Iowa Supreme Court has repeatedly said that “it is the legislature’s duty to declare the law and the court’s responsibility to interpret the law.”⁴⁸⁵ The court presumably would

(Iowa 2002) (citing *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000)).

476. *Id.* (citing *State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001)).

477. *Id.* (quoting *Hoegh*, 632 N.W.2d at 889) (internal quotation marks omitted).

478. *Id.* at 261 (quoting 16A AM. JUR. 2D *Constitutional Law* § 249, at 152 (1998)) (internal quotation marks omitted).

479. *See id.* at 263.

480. *Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1, 6 (Iowa 1983) (citing *Sioux City v. Young*, 97 N.W.2d 907, 909 (Iowa 1959)).

481. *See Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004).

482. *See State v. Phillips*, 610 N.W.2d 840, 842–43 (Iowa 2000).

483. *See Klouda*, 642 N.W.2d at 261.

484. *See Maddy v. City Council of Ottumwa*, 285 N.W. 208, 213–14 (Iowa 1939).

485. *Lynch v. Saddler*, 656 N.W.2d 104, 108 (Iowa 2003) (citing *Slockett v. Iowa Valley Cmty. Sch. Dist.*, 359 N.W.2d 446, 448 (Iowa 1984)); *see also Alons v. Iowa*

find a similar distinction between legislation setting a general burden of proof for the review of administrative rules and the ARRC procedure, which allows a small group of legislators to decide the burden of proof in individual cases based on their judgment about what the law really means.⁴⁸⁶

Long ago, the Iowa Supreme Court recognized that the legislature must be able to appoint such officials “as are essential to the proper and independent discharge of its functions.”⁴⁸⁷ Thus, the legislature is able to appoint officers such as editor of the Iowa Code and the director of the Iowa Legislative Services Bureau, because these positions have no external effect and are all related to the function of the legislature itself.⁴⁸⁸ Other joint legislative committees, such as the Iowa Legislative Fiscal Committee, stay within constitutional bounds because they simply gather and analyze information to form recommendations for the legislature as a whole.⁴⁸⁹

The Iowa Attorney General has issued several opinions over the years describing Iowa’s separation of powers principles. Long before *Chadha*, the Iowa Attorney General concluded that no legislative veto was permissible because it would violate the presentment requirement.⁴⁹⁰ In 1975, the attorney general expressed the opinion that a statute requiring a legislator to be appointed to serve on an executive department commission violated separation of powers principles.⁴⁹¹ The attorney general found it significant that the committee members exercised “sovereign power” when they negotiated and approved contracts that would bind Iowa.⁴⁹² Under Article III, section 1, such executive activity by a member of the legislature was unconstitutional.⁴⁹³ Similarly, in 1986, the attorney general found that the appointment of agency officials by a committee of the legislature would

Dist. Court, 698 N.W.2d 858, 873 (Iowa 2005).

486. *See supra* Part II.A.

487. *Hutchins v. City of Des Moines*, 157 N.W. 881, 887 (Iowa 1916).

488. *See* IOWA CODE § 2.42(2), (11) (2011).

489. *See id.* § 2.46.

490. 1967–1968 IOWA ATT’Y GEN. BIENNIAL REP. 78–79. Although the subsequent amendment to the Iowa constitution authorized a two-house legislative veto, the attorney general’s description of the state constitution’s basic separation of powers principles remains persuasive. *See* IOWA CONST. art. III, § 40 (indicating passage of the amendment in 1984).

491. *Iowa Op. Att’y Gen. No. 75-9-14*, 1975 WL 368811, at *2 (Iowa A.G.) (Peterson).

492. *Id.* at *1 (citing *Vander Linden v. Crews*, 205 N.W.2d 686 (Iowa 1973)).

493. *Id.* at *2.

violate the separation of powers principles.⁴⁹⁴ The attorney general noted that the legislature could appoint only those officers whose appointments “are essential to the proper and independent discharge of its functions.”⁴⁹⁵ While not binding on the Iowa Supreme Court, these opinions show that the state’s own counsel has consistently interpreted the Iowa constitution to require strict adherence to separation of powers principles.

C. Constitutionality of ARRC Objection Authority

In order to assess the constitutionality of the ARRC’s objection authority, a court must first determine whether this type of action is legislative, judicial, or executive in nature, or whether it can instead be characterized as something else. Legislators generally have one function: lawmaking.⁴⁹⁶ They cannot act in an executive or judicial capacity.⁴⁹⁷ Thus, if what the ARRC members do in changing the burden of proof and triggering fee-shifting is either executive or judicial, the objection authority unduly intrudes into the functions of those branches;⁴⁹⁸ if instead it is legislative, it violates the bicameralism requirement.⁴⁹⁹ The only way to avoid that conclusion is to argue that the objection authority is none of those things since it is the sort of non-lawmaking legislative activity that is typically delegated to legislative committees. However, judicial decisions have limited that non-lawmaking type of legislative activity to only those actions that have no external effect.⁵⁰⁰

The ARRC objection may be viewed as a legislative action because it effectively amends the general burden of proof allocation in the IAPA.⁵⁰¹

494. 73 Iowa Op. Att’y Gen. No. 86-1-7, 1986 WL 79953, at *4 (Iowa A.G.). Although the legislature has the power of appointment, the attorney general found the functions of the appointees to the Iowa Economic Protective and Investment Authority were not “essential to the proper and independent discharge of legislative functions.” *Id.* at *3. Therefore, their appointment violated the doctrine of separation of powers. *Id.*

495. *Id.* at *2 (quoting *Hutchins v. City of Des Moines*, 157 N.W. 881, 887 (Iowa 1916)) (internal quotation marks omitted).

496. See IOWA CONST. art. III, div. 2, §1.

497. See *id.*, div. 1, § 1.

498. See *id.*

499. See *id.* § 17 (requiring assent by both chambers of the legislature to pass a bill).

500. See, e.g., *INS v. Chadha*, 462 U.S. 919, 952 (1983); *Hutchins*, 157 N.W. at 887.

501. See *Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004).

The objection acts as a toggle switch, allowing the ARRC to decide who should bear the burden of proof in a particular case.⁵⁰² The action affects the legal rights of citizens because it gives certain agency rule opponents an advantage in court and the opportunity to obtain attorney's fees.⁵⁰³ Because the objection is a legislative act, the provision fails the bicameralism and presentment requirements for legislative enactments.⁵⁰⁴ Because the Iowa constitution waives the presentment requirement for the legislative veto of administrative rules, it is possible to argue that an objection does not require gubernatorial action.⁵⁰⁵ The constitutional provision allowing legislative veto, however, requires the action of a majority of both houses and does not allow legislative veto by committee.⁵⁰⁶

Alternatively, the objection provision can be viewed as an encroachment on the judicial function since it allows a legislative committee to decide the burden of proof to be applied in an individual case.⁵⁰⁷ The legislature has the authority to decide the *general* burden of proof courts should employ in a particular class of cases.⁵⁰⁸ In fact, that is what the legislature did in the IAPA, which sets out the general burden of proof to be applied in challenges to agency action.⁵⁰⁹ However, as noted previously, the Iowa Supreme Court has made it clear that the application of those general standards to particular cases must be reserved for the judicial branch.⁵¹⁰

Finally, a court could view the objection power as an undue

502. See IOWA CODE § 17A.4(6) (2011).

503. See *id.*

504. See, e.g., *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 633 (W. Va. 1981) ("These constitutional provisions clearly limit the power of the Legislature to give the binding effect of law to its actions. It may create law only by following the formal enactment process. Where it seeks to give legal force to informal actions, the Legislature exceeds the limits of its constitutional authority."); see also IOWA CONST. art. III, §§ 16–17.

505. IOWA CONST. art. III, § 40, added to the constitution in 1984, provides: "The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly." IOWA CONST. art. III, § 40.

506. See *id.* (requiring "passage of a resolution by a majority of all members of each house of the general assembly" (emphasis added)).

507. See IOWA CODE § 17A.4(6) (2011).

508. See *Drady v. Dist. Court of Polk Cnty.*, 102 N.W. 115, 117 (Iowa 1905).

509. IOWA CODE § 17A.19.

510. See *Drady*, 102 N.W. at 117.

encroachment on executive power. The committee's action might be seen as administering the law since it involves interpreting and applying the law to specific issues of policy that the legislature delegated to the executive branch. Those kinds of decisions must be made by executive officials.⁵¹¹ Under the principles set out in *Springer* and *Metropolitan Washington Airports Authority*, the legislature cannot appoint its own members to oversee administrative decisions that have been delegated as executive functions.⁵¹² Even if a court does not view the committee's actions as executive, it may decide that this degree of legislative interference with executive authority is unacceptable.⁵¹³

Thus, no matter how one characterizes the ARRC objection power, it is unconstitutional. While the IAPA sets forth the general burden of proof to be applied to administrative rulemaking challenges, the ARRC provision allows a legislative committee to change that burden of proof in individual cases.⁵¹⁴ It allows the committee members to judge whether they believe a particular rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency,"⁵¹⁵ which is the role of the judiciary in reviewing administrative rules.⁵¹⁶ The ARRC provision then allows a small group of legislators to significantly affect potential litigation by changing the procedural rules for any case involving the particular rule.⁵¹⁷ This seems to fall clearly on the unconstitutional side of the line drawn by the Iowa Supreme Court in deciding the proper reach of legislative and judicial power.

Professor Bonfield, in his seminal treatise on state administrative rulemaking, concluded that the objection power would likely be deemed constitutional.⁵¹⁸ Bonfield based his assessment primarily on the fact that the "ultimate validity of the rule will be determined de novo by the courts," regardless of the committee's action.⁵¹⁹ His analysis, however, was written in the mid-1980s, before the string of recent Iowa Supreme Court cases that

511. See IOWA CONST. art. IV, §§ 8–9.

512. See *supra* notes 404–09, 433–41 and accompanying text.

513. See *supra* notes 453–57 and accompanying text.

514. See IOWA CODE § 17A.4(6)(a).

515. *Id.*

516. See *id.* § 17A.19.

517. See *id.* § 17A.4(6)(a).

518. BONFIELD, *supra* note 40, § 8.3.3(k).

519. *Id.*

more precisely delineated the scope of legislative and judicial power.⁵²⁰ Moreover, he was writing before the U.S. Supreme Court decided important cases on the separation of powers such as *Morrison v. Olson*,⁵²¹ *Metropolitan Washington Airports Authority*,⁵²² and *Bowsher v. Synar*,⁵²³ all of which served to more clearly illuminate the proper division of authority among the branches of government.

On the other hand, Professor Bonfield did conclude that giving a legislative committee the authority to veto or suspend agency rules was not only unconstitutional, but also a bad policy decision.⁵²⁴ He laid out his reasoning in detail, and although he was only criticizing committee veto and suspension of rules, much of his reasoning would seem to hold equally true for the ARRC objection authority. Bonfield first noted that “schemes of this sort unduly aggrandize the legislature’s authority at the expense of the executive branch’s countervailing independence.”⁵²⁵ He then observed that courts will strike down agency rules that truly are arbitrary or contrary to statutory authority, which means that committee powers will primarily be used against “unwise” rather than unlawful regulations.⁵²⁶ The committee is only a small portion of those designated to perform the task of lawmaking; Bonfield noted: “To preserve the considerable benefits of the statute-making process, a portion of that process must not be in a position to displace action of the more representative and more authoritative whole, with its carefully tuned checks and balances.”⁵²⁷ He also believed the legislative committee “may be more susceptible to undue influence by special interest groups seeking action inconsistent with the political will of the entire body politic and contrary to the public interest.”⁵²⁸ The committee’s authority would drive agencies to give its

520. See, e.g., *Doe v. State*, 688 N.W.2d 265 (Iowa 2004) (marking the bounds of the judiciary’s sentencing authority); *Klouda v. Sixth Judicial Dist. Dep’t of Corr. Servs.*, 642 N.W.2d 255 (Iowa 2002) (rejecting a legislative attempt to alter sentence suspension authority); *State v. Phillips*, 610 N.W.2d 840 (Iowa 2000) (asserting legislature’s power over matters of parole and work-release for convicts).

521. *Morrison v. Olson*, 487 U.S. 654 (1988).

522. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

523. *Bowsher v. Synar*, 478 U.S. 714 (1986).

524. BONFIELD, *supra* note 40, § 8.3.2.

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

opinion more weight than that of the general public, which Bonfield found gave the committee "undue influence."⁵²⁹ Moreover, one of the salient purposes of separating powers is accountability: the public needs to know who is responsible for particular actions so they may respond at the ballot box. The committee's power to affect the regulatory process may confuse the public as to whom to hold accountable for agency regulation.⁵³⁰ Finally, Bonfield noted that it was impossible for one committee to meaningfully review all regulations from all agencies, which means the committee's work will be focusing on only those agencies or rules that committee members find particularly interesting.⁵³¹

Therefore, Bonfield considered it very important that the IAPA required full legislative action to reverse a particular rule that a committee finds objectionable.⁵³²

Only a statute should be sufficient to overcome a valid legislative rule. The legislature should not be empowered, and is not empowered, to undercut the rulemaking power delegated by statute to the agency without going through the exact same process by which the original delegation was made. The separation of powers concept embodied in the Iowa Constitution precludes any other result.⁵³³

Although Professor Bonfield found committee suspension and veto provisions constitutionally unsound, he argued that giving the ARRC objection authority was permissible.⁵³⁴ His reasoning focused on whether the ability of the legislative committee to change the burden of proof unduly intruded on the functions of the other branches:

(1) Executive function: Bonfield thought that an objection could be distinguished from a legislative veto since committee members "*do not themselves* invalidate rules or thwart their effectiveness. They only shift to the agency the burden of demonstrating that the rule is valid in subsequent

529. *Id.*

530. *Id.*

531. *Id.*

532. Bonfield, *supra* note 65, at 904.

533. *Id.* (footnotes omitted). Bonfield contrasted and criticized other states that allowed legislative vetoes of administrative rules by joint or concurrent resolution. *See id.* He was writing, however, before the Iowa constitution was amended to allow legislative nullification of administrative rules by concurrent resolution. IOWA CONST. art. III, § 40 (indicating adoption in 1984).

534. *See* Bonfield, *supra* note 65, at 918–20.

litigation.”⁵³⁵ Bonfield emphasized that only a court may ultimately hold the rule invalid.⁵³⁶ Therefore, the ARRC does not exercise an executive function because the committee’s actions do not “directly control or block, by their own force, an agency’s performance of purely administrative tasks.”⁵³⁷

(2) Judicial function: Bonfield noted that the delegation of quasi-judicial functions to agencies have been routinely upheld, if the legislature provided sufficient standards.⁵³⁸ Certainly, the ARRC is given a particular standard here—“unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency.”⁵³⁹ Moreover, the committee does not have the authority to make the ultimate judgment on a rule’s validity; that power is reserved for the judiciary.⁵⁴⁰

(3) Legislatures may apportion burden of persuasion, may regulate court practice and procedure, and may alter the presumption of validity given to administrative rules.⁵⁴¹ The committee is simply fine-tuning those legislative prerogatives.

Bonfield did acknowledge “some residual doubts as to the constitutionality of [the objection power].”⁵⁴² However, he argued that the authority to shift the burden of proof “is really not that potent or significant.”⁵⁴³ Now, of course, there is empirical data showing the impact of the ARRC’s powers on administrative rulemaking has been significant.⁵⁴⁴

Moreover, although Bonfield makes the best argument possible for the ARRC objection power, his reasoning is no longer persuasive in light of developments in separation of powers jurisprudence.⁵⁴⁵ In the first place,

535. BONFIELD, *supra* note 40, § 8.3.3(k).

536. *Id.*

537. *Id.*

538. *Id.*; Bonfield, *supra* note 65, at 921.

539. IOWA CODE § 17A.4(6) (2011).

540. BONFIELD, *supra* note 40, § 8.3.3(k).

541. *Id.*

542. *Id.*

543. Bonfield, *supra* note 65, at 922.

544. *See supra* Tables 3–5 and accompanying text.

545. *See, e.g.,* E. Buchanan Tel. Coop. v. Iowa Utils. Bd., 738 N.W.2d 636, 641–42 (Iowa 2007) (rejecting the executive branch’s use of an injunction remedy as encroaching on the judicial branch).

his argument cannot overcome the primary constitutional infirmity presented by the committee objection—that it constitutes lawmaking, which can be exercised only by the full legislature.⁵⁴⁶ Bonfield recognized that “it could be argued that the legislature may not delegate to a legislative committee its probable discretion to apportion the burden of proof in judicial proceedings involving the validity of particular rules.”⁵⁴⁷ However, he believed this argument could

be answered by reference to the adequacy of the standards and other safeguards surrounding the exercise of this discretionary power by the legislative committee. . . . After all, delegations of authority by the entire legislature to other bodies are permitted in most states if adequate safeguards (including standards) accompany them.⁵⁴⁸

Legislative delegations of authority to *administrative agencies* require standards to avoid an unconstitutional delegation of the legislative function. For example, in *Whitman v. American Trucking Ass’n*, the U.S. Supreme Court upheld Congress’s delegation of authority to set air quality standards for the EPA, because Congress gave the agency an “intelligible principle” to follow.⁵⁴⁹ The Iowa Supreme Court similarly allows such delegation since agencies are responsible for executing the law and some discretion is inherent in the task of administering legislative commands.⁵⁵⁰ In Iowa, the delegation is permissible as long as the legislature sets forth an “intelligible goal and complete declaration of policy.”⁵⁵¹

However, such policy-making discretion may be delegated only to the executive branch—not to a subset of legislators. The legislature cannot, for example, pass a law allowing a joint committee to fill in the details of a particular statute.⁵⁵² When the legislature acts, it must act through the constitutionally mandated procedure.⁵⁵³ When it creates rulemaking authority, it must allow the executive to carry out the law, subject only to judicial review and the legislature’s power to modify or retract the

546. IOWA CONST. art. III, § 40 (granting the legislature power to nullify an administrative rule by majority vote of both houses, without the governor’s signature).

547. BONFIELD, *supra* note 40, § 8.3.3(k).

548. *Id.*

549. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

550. *See State v. Steenhoek*, 182 N.W.2d 377, 380–81 (Iowa 1970).

551. *Id.*

552. *See* IOWA CONST. art. IV, § 9; *id.* art. III, div. 1, § 1.

553. *See id.* art. III, div. 2, § 1; *id.* art. III, div. 1, § 1.

authority.

The U.S. Supreme Court made clear in *Metropolitan Washington Airports* that the legislative branch cannot encroach on executive branch duties.⁵⁵⁴ Other attempts at legislative “aggrandizement” have been uniformly held invalid.⁵⁵⁵ For example, in *Springer v. Philippine Islands*, the Court invalidated Philippine legislation that authorized a legislative committee to perform what the Court held to be the executive function of managing government-owned corporations.⁵⁵⁶ Similarly, in *Bowsher*, the Court held that the comptroller general was an agent of Congress and, therefore, it could not exercise executive powers such as making budgetary decisions.⁵⁵⁷ These cases make it clear that the legislature can delegate policy-making authority, but only to the executive or judicial branch, not to its own members.⁵⁵⁸

Of course, the Iowa Supreme Court need not take the same strict approach to separation of powers that the U.S. Supreme Court has adopted. Nevertheless, there is every reason to believe the court would find the federal jurisprudence persuasive. While Iowa law does not contain many cases on separation of powers, it is clear that similar principles are at stake. The Iowa Supreme Court has held, for example, that the legislature must limit itself to making law, while the judicial branch interprets it.⁵⁵⁹ Those opinions indicate that the application of general legal principles to particular facts and law are judicial or executive functions.⁵⁶⁰ That is precisely what the ARRC legislators are doing when they determine whether they think a particular rule is within an agency’s statutory authority.

The Iowa constitution specifically allows two exceptions to the traditional separation of powers structure. As previously discussed, Article

554. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274–75 (1991).

555. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *Springer v. Philippine Islands*, 277 U.S. 189, 202–03 (1928).

556. *Springer*, 277 U.S. at 202–03.

557. *Bowsher*, 478 U.S. at 733–34.

558. *See id.*; *Springer*, 277 U.S. at 202–03.

559. *See Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 873 (Iowa 2005); *Lynch v. Saddler*, 656 N.W.2d 104, 108 (Iowa 2003); *Maddy v. City Council of Ottumwa*, 285 N.W. 208, 213–14 (Iowa 1939).

560. *Alons*, 698 N.W.2d at 873; *Lynch*, 656 N.W.2d at 108; *Maddy*, 285 N.W.2d at 213–14.

III, section 40, allows the nullification of administrative rules by a resolution enacted by both houses of the Iowa General Assembly.⁵⁶¹ Article III, section 16, allows the governor a line-item veto for appropriations legislation,⁵⁶² which would otherwise be unconstitutional lawmaking by the state's executive.⁵⁶³ One might argue that these two exceptions prove that Iowa does not take as strict a view of the separation of powers compared to the federal interpretation; if these exceptions do not undermine the system, then why not allow others?

The exceptions, however, prove the rule. If Iowa did not have a strict interpretation and application of the separation of powers, why would these exceptions be necessary? If Iowans are convinced that the ARRC procedures do not seriously undermine the democratic system, they should enact a constitutional amendment setting out exactly what intrusion into the executive and judicial power they believe is justified.⁵⁶⁴ We should not allow further erosion of the separation of powers without explicit constitutional authorization.

The Iowa Supreme Court, in fact, recently stated something very similar in discussing the reach of the line-item veto provision, which it considered an executive intrusion on a legislative function:

The item veto power provides a substantial limitation on the principle that "[t]he appropriation of money is essentially a legislative function under our scheme of government."⁵⁶⁵ In fact, the item veto power grants the governor a limited legislative function in relation to appropriation bills. This legislative function runs contrary to the inherent "power to specify how the money shall be spent"⁵⁶⁶ granted the legislature through the general appropriation power. It is also a significant deviation from the traditional separation of powers between the three branches of government. For these reasons, the item veto

561. IOWA CONST. art. III, § 40.

562. *Id.* § 16.

563. See Brent R. Appel, *Item Veto Litigation in Iowa: Marking the Boundaries Between Legislative and Executive Power*, 41 DRAKE L. REV. 1, 3-4 (1992).

564. Iowans have, in two instances already, enacted constitutional amendments. IOWA CONST. art. III, §§ 16, 40 (permitting gubernatorial line-item veto despite non-legislative alteration of appropriations bills, and authorizing bicameral majoritarian resolutions to reject a state agency's rules).

565. *Rants v. Vilsack*, 684 N.W.2d 193, 201-02 (Iowa 2004) (quoting *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975)).

566. *Id.* (quoting *Welden*, 229 N.W.2d at 710).

power is to be construed narrowly, and any doubt over the extent of the power “should be resolved in favor of the traditional separation of governmental powers and the restricted nature of the veto.”⁵⁶⁷

Thus, the fact that the Iowa constitution contains two exceptions to the traditional separation of powers structure adds additional weight to the argument that the ARRC intrusions should not be allowed.

Bonfield argued that the ARRC is simply exercising authority over court procedure, which is within the legislative power.⁵⁶⁸ It is probably true that the legislature may determine burdens of proof in general. Typically, states distinguish between substantive rules, which the legislature may set, and procedural rules, which are within the province of the judiciary.⁵⁶⁹ Courts are split on whether the burden of proof is procedural or substantive.⁵⁷⁰ Some states avoid a bright-line rule on the issue and instead examine whether the burden of proof is closely intertwined with a substantive right created by the legislature.⁵⁷¹ If so, the legislature then has the authority to determine the burden of proof along with its delineation of the substantive right.⁵⁷²

567. *Id.* at 201–02 (quoting *Wood v. State Admin. Bd.*, 238 N.W. 16, 18 (Mich. 1931)). The court cited approvingly from *Wood v. State Administrative Board*, in which the court emphasized that departures from the traditional separation of powers must be strictly construed: “This historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another.” *Wood*, 238 N.W. at 18.

568. Bonfield, *supra* note 65, at 920–21.

569. See, e.g., *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, 2012 WL 149761, at *5–6 (distinguishing between substantive court rules, which help define substantive rights created by the legislature and are thus within the legislature’s province to change, versus purely procedural rules, which the judicial branch should govern). Applying that principle, the Arkansas Supreme Court invalidated a legislative attempt to dictate what type of expert witness may testify in medical malpractice cases. *Id.* at *7–8.

570. Compare *State v. Fletcher*, 717 P.2d 866, 871 (Ariz. 1986) (asserting that the burden of proof is considered substantive under Arizona law), and *In re Guardianship of Jeremiah T.*, 976 A.2d 955, 960–61 (Me. 2009) (stating that the burden of proof is substantive), with *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) (maintaining that the burden of proof is procedural), and *Sudwischer v. Estate of Hoffpauir*, 705 So. 2d 724, 729 (La. 1997) (stating that the burden of proof is procedural).

571. *State v. Drej*, 233 P.3d 476, 485–86 (Utah 2010).

572. See, e.g., *id.* (“[A] procedural rule may be so intertwined with a substantive right that the court must view it as substantive.”); see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (plurality opinion)

The Iowa Supreme Court generally holds that the allocation of a burden of proof is within the legislature's province.⁵⁷³ Even if the court were to adopt the case-by-case "intertwining" analysis some states use,⁵⁷⁴ the burden of proof in review of agency action seems to be closely related to the creation of the right of review set out in the IAPA.⁵⁷⁵ If the legislature creates executive authority to create rules, then presumably it can also define the extent of that authority by allocating the burden of proof.

Nevertheless, the fact that the legislature may establish a *general* burden of proof for the review of agency action does not validate the ARRC approach, which allows the committee, a subset of the legislature, to switch the burden on a case-by-case basis.⁵⁷⁶ Applying the legal standard to a particular set of facts is what judges do, not legislators. In fact, in 1998, the IAPA was specifically amended to allow a challenge to agency action on the basis that it is irrational because it is not required by law and its costs grossly outweigh its benefits.⁵⁷⁷ Thus, the determination that a particular rule is unreasonable is a judicial function. If the Iowa Supreme Court does not allow the legislature or executive branch to decide sentences for criminals,⁵⁷⁸ it is hard to imagine how it could allow a group of legislators to decide the appropriate burden of proof in a particular case, based on its interpretation of a law.

The only legitimate committee activity is legislative, so if the committee's objection is considered an amendment of the burden of proof statute, then it must follow the constitutionally mandated rules for enacting laws. Of course, supporters of the ARRC could argue that the committee's powers do not constitute lawmaking.⁵⁷⁹ Neither the objection to nor the delay of a rule will ever find its way into the pages of the Iowa Code.

(finding statutes that "create presumptions, or assign burdens of proof, or prescribe remedies . . . incidental to Congress' power to define the right that it has created"), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

573. State v. Wilt, 333 N.W.2d 457, 461 (Iowa 1983) (stating legislature has "broad latitude" in allocating burden of proof).

574. See, e.g., Drej, 233 P.3d at 485-86.

575. See IOWA CODE § 17A.4(6)(2011).

576. See Drej, 233 P.3d at 485-86.

577. Act of May 19, 1998, ch. 1202, §§ 22-24, 1998 Iowa Acts 611, 622-24 (codified at IOWA CODE § 17A.19 (1999)).

578. See *supra* note 527.

579. See BONFIELD, *supra* note 40, § 8.3.3(k).

Moreover, legislative committees have other powers, such as the subpoena power, that can be exercised without following the constitutional requirements for enacting legislation.

The Idaho Supreme Court used this analysis in upholding a state statute allowing a two-house legislative veto of agency rules.⁵⁸⁰ The court reasoned that such an action with respect to an administrative rule was not lawmaking and thus did not have to follow the presentment requirement.⁵⁸¹ The rescission of an agency rule, it held, is not the equivalent of the enactment of a statute.⁵⁸²

The Idaho decision might be persuasive if the committee's objection had no real consequences—such as the committee objection used in Florida, which courts may give whatever weight they determine it deserves.⁵⁸³ Legislatures can do many things through concurrent or simple resolutions, for example, that are either internal or symbolic and thus do not constitute lawmaking. Moreover, legislative committees have subpoena power, which has an external effect on the individuals summoned to appear, but even that power is allowed only to aid the legislature's information-gathering function.⁵⁸⁴

The line defining lawmaking must be drawn, as the Supreme Court held in *Chadha*, at those actions that have real, external consequences.⁵⁸⁵ The objection power crosses that line because it alters the burden of proof for litigants in a challenge to the rule and shifts the costs and fees for that litigation if the challenger prevails.⁵⁸⁶ This alteration is so significant that the agency may be reluctant to enforce the rule or may be more willing to compromise enforcement decisions rather than risk going to court. The objection power, therefore, affects the legal rights and duties of parties outside the legislature and should not be wielded by a committee alone.

580. Mead v. Arnell, 791 P.2d 410 (Idaho 1990).

581. *Id.* at 414–16.

582. *Id.*

583. See FLA. STAT. ANN. § 120.545 (West 2008 & Supp. 2012); see also Commonwealth v. Sessoms, 532 A.2d 775, 781–82 (Pa. 1987) (upholding a legislative committee's promulgation of sentencing guidelines because they were advisory only and did not alter rights or legal duties).

584. IOWA CODE § 2.23 (2011) (granting committees subpoena power); Watkins v. United States, 354 U.S. 178, 215 (1957) (noting that subpoena power is a valid legislative power, but must respect constitutional rights of individuals).

585. See INS v. Chadha, 462 U.S. 919, 952 (1983).

586. IOWA CODE § 17A.4(6).

D. Constitutionality of ARRC Rule Suspension Authority

It is tempting to view the legislative suspension provisions as less suspect, because they merely delay rules rather than invalidate them. Pragmatically, the delay seems desirable because it allows the legislature time to do what *Chadha* and similar state cases require—invalidate the rule through the full legislative procedure of bicameralism and presentment.⁵⁸⁷ Although the delay may impact certain entities, the suspension is merely temporary, so the effect should be relatively minor. The legislature could accomplish the same result by suspending all new rules until the end of the next legislative session. Adopting this reasoning, the Wisconsin Supreme Court upheld a committee suspension procedure, because the effect of the committee's action was temporary and limited.⁵⁸⁸ However, the court noted that Wisconsin's constitution did not contain express separation of powers provisions, allowing a more liberal interpretation of the bicameralism and presentment requirements.⁵⁸⁹

As noted above, Professor Bonfield was opposed to the suspension power because it gave committees too much authority to intrude upon executive decision making.⁵⁹⁰ Other commenters have argued that committee rule suspension powers are unconstitutional.⁵⁹¹ In a 1986 article, Professor Frickey made the argument that even a suspension of an administrative rule by a joint legislative committee would be unconstitutional.⁵⁹² In his view, the suspension of an administrative rule is a legislative act; therefore, it must follow the state's constitutional requirements of bicameralism and presentment.⁵⁹³ The suspension is lawmaking because it "ha[s] the purpose and effect of altering the rights, duties and relations of persons outside of the Legislative Branch."⁵⁹⁴ Although Frickey's opinion specifically interpreted Minnesota's

587. See, e.g., *Chadha*, 462 U.S. at 948–49.

588. *Martinez v. Dep't of Indus., Labor, & Human Relations*, 478 N.W.2d 582, 585–87 (Wis. 1992).

589. *Id.* at 585.

590. BONFIELD, *supra* note 40, § 8.3.2(b).

591. See Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1249 (1986); see also Zambito, *supra* note 137, at 650.

592. Frickey, *supra* note 591, at 1249.

593. *Id.*

594. *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)) (internal quotation marks omitted).

constitution, his analysis applies with equal force under Iowa law.

There is no question that allowing a committee to pick and choose which rules are to be suspended is a legislative act, as it has a direct impact on the legal rights of those outside the legislative branch. Consider, for example, a rule that grants a property tax exemption for certain pollution control equipment.⁵⁹⁵ If the ARRC puts a session hold on that rule, as it did in 1998, the beneficiaries of that rule will pay more taxes for the year that the rule is not in effect.⁵⁹⁶ In 2002, the ARRC also imposed a delay on a Human Services Department rule that required certain residential care facilities to obtain a license to operate.⁵⁹⁷ Thus, during the period of delay, residents of those facilities did not receive the benefits of licensure and the facility operators did not have to comply with licensure requirements, clearly altering the legal rights of residents and the legal duties of operators. In every case of delay, the delay affects those who would have been benefitted and those who would have been burdened by the rule. In fact, the delay arguably has an even greater impact than an objection because it actually suspends the substance of the rule, albeit temporarily.

While the legislature may choose to delay all administrative rules or all of those in a particular category, it may do so only by properly enacted legislation.⁵⁹⁸ Separation of powers does not, and cannot, allow even minor or temporary intrusions into the territory of the other branches.⁵⁹⁹ As the Court said in *Chadha*, “[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”⁶⁰⁰

There is little state court analysis on the constitutionality of suspension authority. A 1981 New Hampshire decision struck down the state's legislative veto statute and suggested that a temporary rule suspension would not be problematic because it would require the status quo to remain in place while giving the legislature time to follow the constitutionally mandated procedure.⁶⁰¹ Similarly, in 1992, the Wisconsin Supreme Court upheld a suspension provision that it found provided a

595. See 1998 ARRC ANN. REP. 1, 4.

596. See *id.*

597. 2002 ARRC ANN. REP. 1, 8.

598. *State v. Van Trump*, 275 N.W. 569, 570 (Iowa 1937).

599. See IOWA CONST. art. III, div. 1, § 1.

600. *INS v. Chadha*, 462 U.S. 919, 951 (1991).

601. Opinion of the Justices, 431 A.2d 783, 789 (N.H. 1981).

“legislative check on agency action which prevents potential agency overreaching.”⁶⁰² However, the Wisconsin court specifically emphasized that its constitution did not mandate strict separation of powers.⁶⁰³

In contrast, the Pennsylvania Commonwealth Court struck down a statute that gave a legislative committee the authority to suspend a proposed rule it found to be “contrary to the public interest.”⁶⁰⁴ The court found that the committee’s authority did have an external effect, as it was “an impediment to the executive’s rulemaking authority inherent in his duty to administer the laws.”⁶⁰⁵ Citing *Bowsher* and *Chadha*, the court held that only duly enacted legislation could be used to override the rulemaking authority of an agency.⁶⁰⁶ However, the Pennsylvania Supreme Court subsequently vacated this decision as moot due to legislative amendments to the review procedure.⁶⁰⁷ Nevertheless, the opinion is soundly reasoned and persuasive.⁶⁰⁸

In 1997, the Missouri Supreme Court struck down a procedure that allowed a joint legislative committee to suspend administrative rules for twenty days pending committee review.⁶⁰⁹ In addition, the court held provisions that allowed for committee veto of rules and indefinite suspension of rules unconstitutional.⁶¹⁰ Following the reasoning of *Bowsher* and *Chadha*, the court held that the scheme allowed impermissible legislative interference with the executive branch:

The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules. It may, of course, attempt to control the executive branch by passing amendatory or supplemental legislation and

602. *Martinez v. Dep’t of Indus., Labor, & Human Relations*, 478 N.W.2d 582, 587 (Wis. 1992).

603. *Id.* at 585.

604. *Commonwealth, Dep’t of Env’tl. Res. v. Jubelirer*, 567 A.2d 741, 746 (Pa. 1989), *vacated as moot*, 614 A.2d 204 (Pa. 1992).

605. *Jubelirer*, 567 A.2d at 749.

606. *Id.*

607. *Jubelirer*, 614 A.2d 204.

608. *See generally* Zambito, *supra* note 137 (arguing that the revised act still violates the constitution).

609. *Mo. Coal. for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1997).

610. *Id.* at 136; MO. ANN. STAT. § 260.225 (West 2001 & Supp. 2012).

presenting such legislation to the governor for signature or veto, or, by the power of appropriation. The legislature may also hold committee hearings, conduct investigations, or request information from the executive branch.⁶¹¹

The court held that a suspension is a legislative action and must follow the proper process for passage of a bill.⁶¹² The court concluded that “[t]he legislature’s goal of seeking to curtail overzealous bureaucratic intrusion in citizens’ lives is certainly laudable. However, it does not warrant an equally overzealous concentration of power in the legislature.”⁶¹³

V. CONCLUSION

Our empirical study shows that the ARRC’s powers have significantly impacted agency rulemaking in Iowa. Some may argue that the powers of the ARRC are relatively meager—they can delay and they can object, but they cannot actually reverse rules. Nevertheless, these powers intrude significantly into the executive’s rulemaking authority. Although the committee actually objects to or delays a relatively small percentage of rules, data reveals that agencies often take measures to avoid ARRC action. Moreover, data indicates that certain agencies have become favorite targets of ARRC action, which means the *in terrorem* effect of threatened ARRC action is not evenly distributed. Whether one regards the ARRC’s actions as destructive or salutary, the conclusion is inescapable that ARRC committee members are able to exert influence on agency action that far exceeds the influence wielded by other legislators or the public in general.

As a matter of policy, we conclude that allowing a legislative committee this much influence over agency rulemaking undermines democratic values. The agency has the expertise and the time to study rulemaking decisions carefully, and public comment ensures that those decisions will be well-informed. The ARRC’s members, on the other hand, have very little time to consider the issues and are more likely to base their decisions on what a lobbyist has told them. Moreover, the committee’s judgment about whether a rule complies with legislative intent is suspect—this is a small subset of the legislature, who may be many years removed from the legislature that enacted the statute under consideration. It seems clear that ARRC influence does not lead to better rulemaking, and by that

611. *Mo. Coal.*, 948 S.W.2d at 134 (citations omitted).

612. *Id.*

613. *Id.*

we mean rules based on objective expert review of the broadest possible information.

Even if the ARRC procedure were beneficial as a matter of policy, it could not survive constitutional scrutiny. In essence, the legislature wants to have its cake and eat it too—it wants to delegate discretionary authority to administrative agencies, yet retain the right to control that discretion on a case-by-case basis. The Iowa constitution, however, gives the legislature only the task of making law; the legislature must allow the executive branch to administer the laws and the judicial branch to interpret them. Certainly the legislature may try to influence the agency by expressing its objections and threatening to cut the agency's budget or narrow or even withdraw its statutory authority. However, when the legislature moves beyond oversight and takes action that has an effect on people outside of the legislature, it must act using the constitutional method for legislative enactments.⁶¹⁴ Both the objection and delay actions cross those boundaries and arrogate to the legislature "the distinct duties of their master's other agents."⁶¹⁵

614. See *Graham v. Worthington*, 146 N.W.2d 626, 631 (Iowa 1966) (noting that "the legislature may enact any law desired provided it is not clearly prohibited by some provision of the Federal or State Constitution." (citing *Tice v. Wilmington Chem. Corp.*, 141 N.W.2d 616, 623 (Iowa 1966))).

615. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (quoting Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 385–86 (1976)) (internal quotation marks omitted).